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# F14a

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## STAFF REPORT CDP APPLICATION

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

**Applicants:** Kirk Kozlowski and Mary Lacerte

**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 a mostly below-grade and approximately 110 linear foot long 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:** Denial

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### SUMMARY OF STAFF RECOMMENDATION

The Applicants propose to construct of a mostly below-grade and approximately 110 linear foot long pin pier retaining wall (measuring approximately 2.5 feet wide by approximately 40 feet deep below grade, with about 2 to 3 feet of the top of the wall above grade on its seaward side) 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.<sup>1</sup>

At a fundamental level, the proposed project constitutes an LCP-defined shoreline protection structure, and it does not appear that the LCP would allow such a shoreline protection structure, whether for the subject residence onsite and/or the residences at the base of the bluff on Beach Drive. In order to even consider such shoreline protection structures, the LCP requires that the structures to be protected be considered existing in shoreline protection terms (i.e., where 'existing' in such context means present onsite as of 1977 and not redeveloped since), and that such structures be significantly threatened. 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 would appear to make them no longer "existing" for LCP shoreline structure purposes. In short, it appears that at least two of the three beach-level homes identified for protection via the project do not qualify for shoreline protection structures under the LCP.

As to the degree of threat (were there to be shown to be an "existing structure or structures" in shoreline protection terms), the Applicants' own geotechnical consultants concluded that the Applicants' residence is not significantly threatened. As to the base of bluff structures, the CDP application materials indicate 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 shoreline protection structure terms, the Applicants' own geotechnical consultants, as well as Santa Cruz County's geotechnical experts and the Commission's own Geologist and Coastal Engineer, have all articulated that the proposed project would not be able to fully abate the threat, because the retaining wall would be constructed at the top of the bluff, whereas the landslide scars and past landslides were located predominantly seaward of that point.

And even if it were possible to clearly establish existing significantly threatened structures in shoreline protection structure terms, which it is 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. And here, the Applicants' own alternatives analysis identifies a less environmentally

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<sup>1</sup> The houses at the base of the bluff are within the Beach Drive neighborhood, which is a subdivision that pre-dates the Coastal Act and 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.

damaging alternative that would appear – including in the view of the Commission’s own Geologist and Coastal Engineer – both potentially feasible, as well as more capable of protecting the beach-level homes on Beach Drive (where such alternative project would involve placing landslide catchment structures nearer to those homes). And if the objective of the project is to protect those homes, and if allowable otherwise under the LCP, 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 Applicants have proposed here. Finally, 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 at the current time, the proposed project has other significant coastal resource impacts (including alteration of the natural landform and degradation of public views) that are only likely to be exacerbated over time and its lifetime (including longer term potential effects on shoreline processes, sand supply, and public recreational access),<sup>2</sup> and the proposed project does not include any sort of mitigation for these impacts as is required by the LCP.

In summary, due to the Coastal Act/LCP inconsistency issues highlighted above and as further explained in this report, staff therefore recommends that the Commission deny a CDP for the proposed project. The motion and resolution to implement the staff recommendation are found on page 5 below.

And to be clear, staff is not suggesting that there are no potential landslide issues to be addressed at this location, but rather that the proposed project is not the LCP and Coastal Act consistent method of doing so. To the extent that the Applicants believe that they can resolve 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. And it appears to staff that a more limited and more focused (i.e., to addressing the potential landslide problem at hand) project located closer to the Beach Drive homes could abate landslide threats there with significantly reduced coastal resource impacts. The Applicants are encouraged to work with the affected Beach Drive homeowners to support and pursue such a project while adhering to the provisions of the LCP and the Coastal Act.

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<sup>2</sup> Over the life of the project it is even possible that beach-level development at the base of these coastal 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, including increasing the level and scale of beach level coastal resource impacts.

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**EXHIBITS**

- Exhibit 1 – Location Maps
- Exhibit 2 – Site Photos
- Exhibit 3 – Proposed Project Plans
- Exhibit 4 – Applicants’ Geologic and Geotechnical Reports and Alternatives Analysis
- Exhibit 5 – Commission Staff Coastal Engineer and Geologist Memorandum

**CORRESPONDENCE**

**EX PARTE COMMUNICATIONS**

## 1. MOTION AND RESOLUTION

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

***Motion:*** *I move that the Commission **approve** Coastal Development Permit Number A-3-SCO-23-0051 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 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

### **Project Location**

The proposed 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.<sup>3</sup> 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 action (during high tide and large storm and swell events) as well as by bluff sloughing, and even landslides, including 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.

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<sup>3</sup> Two sections of this Beach Drive area include homes on both sides of the road, namely the portion just upcoast of the project site, and the portion at the downcoast end of Beach Drive starting about one-half mile away.

## **Project Description and History**

The Applicants propose to construct a mostly below-grade and approximately 110 linear foot long pin pier retaining wall<sup>4</sup> along their seaward property line, 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 (thus leaving a gap between them that is at most 3.5 feet), 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 110-foot by 8-foot soil retention wall, with the uppermost 2 to 3 feet of the wall exposed above grade on its seaward side. The project would also include the collection of surface drainage onsite via a 2-foot-wide swale inland of the wall, which would collect site drainage and 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 **Exhibit 3** for the proposed project plans. 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 CDP application for this project was the subject of eight local Santa Cruz County hearings, resulting in three CDP denials by the applicable County decision-making bodies, and ultimately one CDP approval (on local appeal by the Applicants, by the Santa Cruz County Planning Commission) in late 2023. That approval was appealed to the Coastal Commission, and the Commission determined that the County's decision raised a substantial issue and took jurisdiction over the CDP application on February 9, 2024. This staff report and the hearing scheduled for March 15, 2024 are all part of the Commission's de novo review of that CDP application, and thus the second part of that overall appeal process.

## **Coastal Development Permit Determination**

### ***Applicable LCP and Coastal Act Provisions***

The standard of review for this CDP determination is the Santa Cruz County certified LCP and, because the project is located between the nearest public road and the sea, the Coastal Act's public access and recreation provisions. The LCP includes a number of applicable coastal hazards provisions that are similar to the Coastal Act, and at their core are structured to apply strict criteria when evaluating a shoreline protection structure project such as this, including in recognition of the fact that shoreline protection structures can have significant adverse impacts on coastal resources. 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.*

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<sup>4</sup> 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 and 8-feet-high concrete grade beam.

**IP Section 16.10.040: Definitions. (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.

**IP Section 16.10.040: Definitions. (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:<sup>5</sup>

***LUP Policy ARC-5.1.2: Development Within Visual Resource Areas.***

*Recognize that designated visual resources of Santa Cruz County possess diverse characteristics that are worthy of protection. Require projects in visual resource areas to be evaluated against the context of their unique environment and regulate structure height, setbacks, materials, and design to protect these resources consistent with the objectives and policies of this section...*

***LUP Policy ARC-5.1.7: Open Beaches and Blufftops.*** *Do not permit or allow the placement of new permanent structures that would be visible from a public beach, except where allowed on existing parcels of record, or for shoreline protection, public beach access, or public ocean viewing, and where consistent with SCCC Chapter 13.11. Use the following criteria: (a) Allow infill structures (typically residences and accessory structures 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*

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<sup>5</sup> At the time of publication of this staff report, LUP Policies ARC-5.1.2 and ARC-5.1.7 are the results of Santa Cruz County's LCP Amendment LCP-3-SCO-23-0004-1-Part B (Sustainability Update), which the Commission approved, with suggested modifications, at its December 15, 2023 meeting. LUP Policies ARC-5.1.2 and ARC-5.1.7 were not the subject of any suggested modifications made by the Commission, and were instead approved as submitted. Moreover, the Santa Cruz County Board of Supervisors accepted the Commission's suggested modifications on LCP Amendment LCP-3-SCO-23-0004-1-Part B on January 30, 2024, and this acceptance will be reported to the Commission at its March 15, 2024 meeting (the same day that this CDP application will be heard). Thus, unless the Commission does not concur with the Executive Director's determination that Santa Cruz County's acceptance of the suggested modifications was legally adequate, LUP Policies ARC-5.1.2 and ARC-5.1.7 are the legal standard of review for this CDP application. It must be noted that the previous versions of ARC-5.1.2 and ARC-5.1.7 are quite similar to the version of the policies cited herein, and the applicability of these policies would be the same regardless of the outcome of the Commission's certification review of LCP Amendment LCP-3-SCO-23-0004-1-Part B at its March 15, 2024 meeting.

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. ... (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. (emphasis added in bold)

And Coastal Act provisions protecting public access and recreation also strongly protect coastal resources against impacts, 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 ...*

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

**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.*

Within this framework, as applicable here, the LCP limits consideration of shoreline protection structures to cases where a certain type of existing structure is significantly threatened. There is thus a two-tiered set of criteria that the Commission must first evaluate in order to allow consideration of a proposed shoreline protection structure in this case. First, there must be the type of existing structure present that was legally developed prior to the implementation of the Coastal Act on January 1, 1977, and that has not been redeveloped since (see also the discussion on this point below). 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).<sup>6</sup>

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 structures. At a minimum, the LCP only allows shoreline protection structures when shown to be the least environmentally damaging feasible alternative to protect the

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<sup>6</sup> 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).

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 and recreation considerations also applicable at this location). Additionally, the LCP requires that approvable shoreline protection structures must be sited as close as possible to the development or structure requiring protection.

To be clear, the Applicants in this case dispute that their proposed pin pier retaining wall constitutes a shoreline protection structure, and dispute that an “existing structure” means a pre-1977 structure that has not been redeveloped.<sup>7</sup> The Applicants are simply incorrect on both points, and the following sections provide some context for understanding the LCP in this regard.

### Shoreline Protection Structures

First, 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, which means the former do too. In fact, erosion of coastal bluffs is a very natural process, sometimes hastened by interactions of the bluffs with the ocean, and sometimes affected by subaerial climatic processes and well as subsurface processes, and all of which can lead to erosion, including the type of bluff sloughing and landsliding that affect the bluff here (see also the memo on these points from the Commission’s Geologist, Phil Johnson, and Coastal Engineer, Jeremy Smith in **Exhibit 5**). In fact, the whole purpose of the proposed project is an attempt to arrest such erosional processes, and thus the Applicants’ own project description concurs that such processes exist here.<sup>8</sup>

Second, the Applicants suggest that the term “shoreline” must be understood to only apply to the tidal area, and further assert that because the tidal area is seaward of the site, the project is not a ‘shoreline’ project at all, and thus that the proposed project is not a shoreline protection structure. This analysis is simply misplaced. The LCP does not define the term “shoreline” in that manner; rather, where it is used in the LCP it is used more broadly to refer to the overall area near the ocean, and not just the tidal area. For example, the LUP includes a whole section on “Recreational and Coastal Access”, and nowhere does it suggest that the shoreline in question is the tidal area at the lower reaches of beaches. In fact, the LUP refers to coastal access designations with numerous references to the shoreline, where the vast majority of such areas are

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<sup>7</sup> See, for example, comments submitted by the Applicants’ attorney prior to the Commission’s substantial issue determination on February 9, 2024 (see correspondence package for this item).

<sup>8</sup> And to be clear, the project site is part of a coastal bluff pursuant to the definition in IP Section 16.10.070(10) above for similar reasons, all of which is corroborated by definitions found in the Commission’s regulations (see Title 14 California Code of Regulations (CCR) Sections 13577(h)(1)).

not only inland of the tidal area (including bluffs/blufftops, blufftop paths, and overlooks), but also are actually applicable to features of the more inland built environment, such as designated streets and inland walkways (see, for example, LUP pages 3-44 to 3-52). In addition, the Commission's nearly 50 years of coastal program implementation includes evaluation of countless shoreline protection structure projects that were located inland of the tidal area (see again **Exhibit 5** as well), including essentially every such project that was appealed to the Commission in a local government's CDP jurisdiction (i.e., located inland of the mean high tide line), including in Santa Cruz County, and including past appeal cases where pin pier and mostly buried retaining walls were appealed to and denied by the Commission (see, for example, Commission denial of appeal/CDP application A-3-SCO-01-109 (Adams)). In short, the Applicant is simply incorrect, and "shoreline" and shoreline protection structures are not limited to solely projects in the tidal area of the ocean under this LCP, nor under the coastal management program more broadly.

Third, the Applicants point to the *McAllister* court decision<sup>9</sup> to support the premise that the LCP's shoreline protection structure requirements must be read to be consistent with the Coastal Act, including Section 30235,<sup>10</sup> and then assert that Section 30235's reference to "construction that alters natural shoreline processes" implies that this project does not so qualify, arguing that "there is no evidence anywhere in the record of the alteration of natural shoreline processes, resulting from construction of the subject retaining wall" (again, see Applicants' February 6, 2024 correspondence). Although the Commission agrees about the way in which the *McAllister* case affects LCP interpretation, it is incorrect to suggest that the project does not alter natural shoreline processes. As indicated above, erosion and bluff sloughing and even landslides are all natural shoreline processes, and the project is by definition intended to alter same. And, to be clear, Sections 30235's reference to examples of applicable projects includes "cliff retaining walls", which, given that the terms 'cliffs' and 'bluffs' are often used interchangeably in coastal land use,<sup>11</sup> is by itself dispositive that a project like this is subject to Section 30235, and by extension, subject to the LCPs shoreline protection structure provisions (again, see also **Exhibit 5**).<sup>12</sup>

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<sup>9</sup> See *McAllister v. California Coastal Commission* (2009, 169 Cal. App. 4th 912, 929), wherein the Sixth District Court of Appeal overturned a project approval by the Commission in the early 2000s interpreting an LCP ESHA policy to allow non-resource-dependent use and development in ESHA. The Court found that such an interpretation was improper because Coastal Act Section 30240 – from which the LCP's ESHA policies derived their statutory authorities – did not allow non-resource-dependent use and development in ESHA. The Court determined that the LCP cannot be read in a manner inconsistent with the Coastal Act, even if the LCP policies were drafted in a manner that might provide an argument to allow a non-resource-dependent use in ESHA. More broadly, the Court determined that an LCP derives its statutory authority from the Coastal Act, and it must be understood in ways that are Coastal Act consistent, and not in ways that are inconsistent with the Act. As a published appellate court decision, that decision requires the Commission to interpret LCPs, including the Santa Cruz County LCP in this case, in that way.

<sup>10</sup> See also discussion below regarding Section 30235.

<sup>11</sup> And are by definition in this LCP; see IP Section 16.10.040: Definitions. (10).

<sup>12</sup> On this point, the Applicants appear to argue in their February 6, 2024 correspondence that IP Section 16.10.040's definition of shoreline protection structure is inconsistent with Coastal Act Section 30235 because Section 30235 specifies "natural shoreline processes," which are confined to the tidal area per

And finally, to the extent there was any question on this issue, which there is not, the purpose and structure of the Coastal Act clearly support addressing the proposed project as a shoreline protective structure. For example, not only does Section 30009 require a liberal interpretation to protect shoreline and beach resources,<sup>13</sup> but Section 30007.5 also directs the Commission to resolve conflicts in a manner that is “most protective of significant coastal resources.”<sup>14</sup> There is no question that coastal bluffs such as those present at this location are significant coastal resources, and projects like this that attempt to alter them must be appropriately evaluated in such context (and not, as the Applicants imply, allowed to be understood as if such resources simply were not present, are too far inland, and/or are not valuable enough for such an evaluation). In drawing such a conclusion it is noted that courts have relied on Section 30009 to find that exceptions to the Act’s requirements must be read narrowly.<sup>15</sup> Accordingly, including as upheld by the courts, the Coastal Act’s provisions applicable to this project (and by extension the LCP’s provisions applicable to this project) are required to be implemented so as to be most protective of significant coastal resources. Further, lest there be any question, the courts have tasked the Commission as the ultimate arbiter for LCP interpretation.<sup>16</sup> In sum, the proposed project is a “structure ... placed in an area where coastal processes operate” and it constitutes a shoreline protection structure for purposes of LCP evaluation.

### Existing structures

The issue of what constitutes an “existing structure” for Section 30235 and LCP purposes has been debated for many years, where some have argued at times that it means whether a structure is simply ‘extant’ at the time of shoreline protection structure

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their argument, whereas IP Section 16.10.040 refers to “coastal processes”, which they appear to allege is an inappropriately broader term. Put another way, the Applicants appear to argue that an LCP cannot go further than the Coastal Act on this point, including by suggesting that such shoreline protection structure provisions can also apply at more inland locations (i.e. where coastal processes operate). If that argument were accurate, and it is not (see also above), it is undermined by Coastal Act Section 30005(a), which allows LCPs to be more restrictive than the Coastal Act with respect to development that may adversely affect coastal resources. And, as applicable to this case, the Commission has continually found that shoreline protection structures do adversely affect coastal resources. See, again, *McAllister v. California Coastal Commission* (2009), 930 n.9 (“As long as an LCP is not inconsistent with the Coastal Act, it can be more restrictive”, citing also *Yost v. Thomas* (1984) 36 Cal.3d 561, 572 and *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1297). Even if the Applicant is correct in their argument, which they are not, they argue the inverse, namely that *McAllister* would limit this LCP to only the Applicants’ argued definition of “shoreline” which is incorrect, including as an LCP can be more restrictive.

<sup>13</sup> Section 30009 requires that: “This division [i.e., the Coastal Act] shall be liberally construed to accomplish its purposes and objectives.”

<sup>14</sup> Section 30007.5 states, in applicable part: “The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources.”

<sup>15</sup> See, for example, *Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1586-87 (“[i]n light of the legislative directive to construe the Act liberally...it is appropriate to construe the exceptions narrowly”, quoting *Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344, 355).

<sup>16</sup> California law affords “great weight” to the Commission’s interpretation of the statutes and regulations under which it operates (see, for example, *Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 922-23; and *Reddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 965).

application, which is the Applicants' argument in this case. Another interpretation is that the State Legislature intended the word to mean exactly what it meant at the time when the Legislature chose to use the word. In other words, in enacting the statute in 1976, the Legislature included the word "existing" in the natural sense, to mean existing at that time.

The question is critical because the Coastal Act is, at its core, a law that requires coastal resource protection. In adopting the Act in 1976, the Legislature included a series of goals and objectives. For example, Coastal Act Sections 30001 and 30001.5 state:

**Section 30001.** *The Legislature hereby finds and declares: (a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem. (b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation. (c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction. (d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.*

**Section 30001.5.** *The Legislature further finds and declares that the basic goals of the state for the coastal zone are to: (a) Protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources. (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state. (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners. (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast. (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone. (f) Anticipate, assess, plan for, and, to the extent feasible, avoid, minimize, and mitigate the adverse environmental and economic effects of sea level rise within the coastal zone.*

In short, the law recognizes the coastal zone as a special place, where coastal resources are of "paramount concern", and requires that it both be protected against degradation, and enhanced where feasible. To implement these objectives, Coastal Act Chapter 3 includes a series of specific provisions that clearly and emphatically require the protection of coastal resources, from public recreational access to coastal habitats

to public views and landforms.<sup>17</sup> And, perhaps just as clearly, shoreline protection structures generally have significant adverse impacts on the coastal resources protected by Chapter 3, generally leading to unavoidable impacts on natural landforms, public recreational access, natural processes (which also significantly impacts public recreational access) and public views.<sup>18</sup> These impacts are all inconsistent with the Coastal Act's resource protection requirements, and consequently, the Coastal Act generally directs that shoreline protection structures be denied in order to meet these Coastal Act coastal resource protection requirements. In other words, the Coastal Act generally prohibits shoreline protection structures except under very limited circumstances, and this general prohibition is echoed by Coastal Act Section 30253, which makes it clear that all development, including shoreline protection structures, is not to be approved if it will cause erosion or destruction of the site, or substantially alter natural landforms,<sup>19</sup> which past cases have shown is predominately the case with armoring.<sup>20</sup>

In fact, as contrasted with the numerous Coastal Act resource protection provisions, both broad and specific, there is only one Coastal Act section that specifically allows shoreline protection structures, Section 30235, and it includes important – and severely limiting – criteria. Section 30235 states, in applicable part:

***Section 30235.*** *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.*

...

Thus, Section 30235 requires the Commission to approve shoreline protection structures under very limited circumstances, namely when required to serve coastal-dependent uses or to protect public beaches or existing structures in danger from erosion, and only when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.<sup>21</sup> In other words, when there are qualifying uses, beaches, or

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<sup>17</sup> See, for example, more than 40 sections nested in Chapter 3, including sections related to public access, recreation, the marine environment, and land resources.

<sup>18</sup> 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), 3-16-0345 (Honjo Armoring), 3-16-0446 (Rockview Seawall), and 2-17-0702 (Sharp Park Golf Course).

<sup>19</sup> Section 30253 states, in applicable part, that "New development shall...Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area **or in any way require the construction of protective devices** that would substantially alter natural landforms along bluffs and cliffs" (emphasis added).

<sup>20</sup> See references in Footnote 18 above.

<sup>21</sup> And to be clear, these are only the specific mitigating measures required through Section 30235 itself. As indicated, shoreline protection structures generally have fairly significant impacts on coastal resources, and the rest of the Chapter 3 provisions are also applicable, including in terms of coastal



structures,<sup>22</sup> shoreline protection structures must be allowed only if required to serve/protect them, meaning when there are no other less environmentally damaging feasible alternatives that can perform that same function. Put differently, given that shoreline protection structures have significant adverse impacts on a variety of protected coastal resources and are only required to be approved in very limited circumstances, the Coastal Act should generally be understood as prohibiting shoreline protection structures, with extremely limited exceptions.<sup>23</sup> When framed in this way, Section 30235's limited requirement to approve shoreline protection structures is probably best understood as allowing an extremely narrow exception to the Coastal Act's coastal resource protection provisions, or put another way, an 'override' of the other Coastal Act sections found in Chapter 3 that would require the Commission to otherwise deny the project.

The purpose and structure of the Coastal Act support such an interpretation as well, where, as described above, the Act is required to be liberally interpreted to protect coastal zone resources, including to resolve any conflicts in a manner that is most protective of significant coastal resources. And including where courts have upheld such requirements, and, importantly, have tasked the Commission as the ultimate arbiter for LCP interpretation.<sup>24</sup> In short, Coastal Act Section 30235 is a type of override over other Coastal Act provisions that allows shoreline protection structures if required to serve a coastal-dependent use or to protect an existing structure in danger from erosion (as applicable to this proposed project) subject to the requirement that adverse impacts to local shoreline sand supply are mitigated or eliminated. The Coastal Act provides for these limitations because shoreline armoring can have a variety of negative impacts on coastal resources, including adverse effects on sand supply, public access, coastal

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resource impact avoidance, and appropriate, commensurate, and offsetting mitigation for unavoidable impacts in order to meet other Chapter 3 requirements in addition to those inherent to Section 30235.

<sup>22</sup> Two of the three qualifying uses are based on protecting important State shoreline priorities (coastal-dependent uses and public beaches). Importantly, shoreline protection structures rarely protect beaches; rather, shoreline protection structures typically lead to the incremental loss of beaches. In fact, when public beaches are in danger of erosion, such danger is typically exacerbated by such structures as opposed to protected by them because such structures typically not only occupy beach and shoreline space that would otherwise be available to public recreational uses, but they also inhibit the transmittal of beach-generating materials from bluffs, and typically lead to loss of beaches over time as an eroding shoreline bumps up against such armoring (also referred to as the 'coastal squeeze' or passive erosion). Thus, bracketing groins in certain circumstances, shoreline protection structures are typically not a viable/fruitful response to protect a public beach in danger from erosion. Finally, past these two important State shoreline priorities, the only other development allowed shoreline protection structures by Section 30235 are qualifying existing structures, including both public (e.g., streets, utilities, etc.) and private (e.g., residences) structures.

<sup>23</sup> It has been hypothesized by some that there may be rare circumstances when a project may include shoreline protection structures and the overall project may still be consistent with the Coastal Act's coastal resource protection requirements. In such a case, were it to be shown to exist, a project could hypothetically be found consistent with the Coastal Act (and thus such shoreline protection structure would not be prohibited per se), where the Section 30235 override would not need to be applied. As a result of this being a rare situation, it is more accurate to say that the Coastal Act should generally be understood as prohibiting shoreline protection structures.

<sup>24</sup> Again, see, for example, *Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 922-23; and *Reddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 965).

views, natural landforms, and overall shoreline beach dynamics on and off site, ultimately resulting in the loss of beaches.<sup>25</sup>

It is within this context that questions regarding the meaning of “existing structure” in Section 30235 must be understood, where the core conflict is whether that term means ‘extant’ at the time of shoreline protection structure application (i.e., the Applicants’ argument in this case), or whether that term means existing at the time the Coastal Act was enacted (in 1976) and implemented (in 1977). It is not an esoteric or trivial difference, as the former would allow for an armoring ‘override’ in essentially every shoreline protection structure application (essentially maximizing the potential for associated coastal resource impacts), and the latter would only allow such ‘override’ in a very limited subset of such applications (essentially minimizing the potential for associated coastal resource impacts). And to be clear, the controversy over these competing interpretations did not fully arise until roughly the year 2000. This is likely due, in large part, to the fact that, prior to then, the post-1976 structures for which the distinction would be most obviously relevant were still relatively new, and the parties who had secured permits to construct them had had to demonstrate that they would be safe without requiring shoreline protection structures. Thus, even if that showing would eventually prove to have been mistaken, coastal erosion had not yet progressed far enough for that error to have become significantly evident and problematic. Since 2000, as the issue has become increasingly contentious, the Commission has become progressively more focused on it and increasingly consistent in adopting the second interpretation – that “existing structures” as the phrase is used in Section 30235 (and corresponding LCP provisions) refers to structures that were legally in existence as of January 1, 1977, the effective date of the Coastal Act, and not redeveloped since (see below).

The interpretation that ‘existing’ means ‘extant’ fails for other reasons as well. For example, Section 30253, the only other Coastal Act section that explicitly refers to such shoreline protection structures, prohibits new development that would “in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.” Thus, development approved since the Act’s effective date is not allowed such shoreline protection structures<sup>26</sup> that lead to substantial natural

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<sup>25</sup> Again, see references in Footnote 18.

<sup>26</sup> It is noted that 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 shoreline protection structures, and it does not extend to shoreline protection structures that may exist at the time that proposed development is being pursued, and thus that such proposed development can rely on such shoreline protection structures notwithstanding such structures may lead to the types of prohibited impacts. However, such an interpretation completely ignores the qualifying language that proceeds such text, which states that the development cannot “in any way” require such shoreline protection structure construction. Proposed development attempting to rely on existing shoreline protection structures is still dependent on such structures having been constructed, which falls under the rubric of “in any way” requiring the construction of shoreline protection structures to protect it. That such shoreline protection structures 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 shoreline protection structures that are already present, it will also have to rely

shoreline landform alteration (which, in the case of shoreline armoring, is essentially all shoreline protection structure cases)<sup>27</sup> pursuant to Section 30253. If Section 30235's 'existing' meant 'extant' at the time of an application, then it would require approval of shoreline protection structures that Section 30253 prohibits, and the two cannot readily be harmonized.

More appropriately, the application of Section 30253 since 1977 creates two types of development under the Coastal Act: pre-Coastal Act development that may not have been built to meet Section 30253 requirements to avoid shoreline protection structures, and post-Coastal Act development that has (including because it is required by Section 30253, and related LCP provisions). Put another way, the Section 30235 requirement to allow for shoreline protection structures regardless of their coastal resource impacts or their inconsistencies with other Coastal Act resource protective provisions in very narrow circumstances is intended to only apply to pre-Coastal Act and not redeveloped development, and not anything else, essentially 'grandfathering' pre-Coastal Act structures and allowing them armoring as an exception to the otherwise applicable Coastal Act requirements.<sup>28</sup> In addition, such pre-Coastal Act structures lose their 'existing' status under Section 30235 if they are modified in such a way that they are no longer the same structure, but rather a replacement structure (often referred to by the Commission as a 'redeveloped' structure).<sup>29</sup>

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on the continued upkeep, expansion, or even eventual rebuilding of those structures, which, by itself, would be relying on the construction of new shoreline protection structures, in violation of Section 30253.

<sup>27</sup> Again, see references in Footnote 18.

<sup>28</sup> As described in the Commission's 2015 Sea Level Rise Policy Guidance, the Commission interprets the term "existing structures" in Section 30235 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, Section 30235's directive to permit shoreline protection structures for certain specific endangered 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 shoreline protection structures for development that existed when the Coastal Act was passed, when such development is in danger from erosion, but to avoid such shoreline protection structures for development constructed consistent with the Act, which does not allow such shoreline altering 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.

<sup>29</sup> Coastal Act Section 30610(d) and CCR Section 13252(b) help define when structures meet or don't meet the redevelopment threshold. CCR Section 13252(b) specifically states that replacement of 50% or more of a structure, including single-family residences, 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

In short, the Coastal Act reflects a broad legislative intent to only allow shoreline protection structures under certain very limited circumstances, generally only for structures that existed when the Coastal Act was adopted and that have not been redeveloped, and when such structures are in danger from erosion (Section 30235), but to prohibit armoring for new development constructed after adoption of the Act (Section 30253). This interpretation to allow protection only for certain structures that predate the Coastal Act is also supported by the Commission's duty to protect public trust resources, and the Coastal Act requirement that the Act "shall be liberally construed to accomplish its purposes and objectives" (Section 30009, previously described), where, as described, the Act on this point strongly protects coastal resources and only allows for shoreline protection structures as an exception – or, put another way, as an override – under extremely narrow circumstances and criteria.

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;" and recognizing the inevitability of ever increasing impacts from shoreline protection structures in an era of sea level rise underlines the importance of limiting the circumstances under which such shoreline protection structures can be approved. Thus, the only types of structures that qualify as "existing structures" allowed shoreline protection structures under Section 30235 and the LCP are those that existed before January 1, 1977 and have not been redeveloped since.

### ***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 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 identified Beach Drive homes. In fact, according to the CDP application materials 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

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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 CDP 3-16-0345 (Honjo armoring)).

striking these downslope residences.<sup>30</sup> For example, the primary geologic investigation prepared for the project states:<sup>31</sup>

*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:<sup>32</sup>

*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, 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 potential project ramifications and LCP issues. Based on available evidence it appears that the Applicants' residence pre-dates CDP requirements and it has not been redeveloped since 1977. If this is the case, then it would qualify as an existing structure for shoreline protection purposes under the LCP. In terms of the second test, the geologic investigation prepared for the project notably states:<sup>33</sup>

*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" in shoreline protection structure terms, 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 three residences at the base of the bluff on Beach Drive (307, 309, and 311 Beach Drive), although there were structures in place on each of these lots before

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<sup>30</sup> Although the project has been characterized for much of its history as addressing legal liabilities, and in fact the Applicants' geologic investigation states as much (see below), the Applicants state in their February 6, 2024 correspondence to the Commission that "Whether or not the Applicants will be shielded from liability as a result of constructing the proposed pin pier retaining wall is irrelevant."

<sup>31</sup> 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 **Exhibit 4**).

<sup>32</sup> 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 **Exhibit 4**).

<sup>33</sup> Zinn Geology 2021 (again, see **Exhibit 4**).

the Coastal Act, at least two such structures (at 307 and 311 Beach Drive) appear to have been redeveloped since January 1, 1977. Specifically, and based on available evidence, it appears that the structures at 307 and 311 Beach Drive have undergone significant alterations (including without CDPs) since 1977,<sup>34</sup> and it would appear that these residences have been redeveloped and would not constitute existing structures in shoreline protection structure terms. As to 309 Beach Drive, there is simply a lack of evidence demonstrating whether that structure has or has not been redeveloped since 1977. In any case, as the project is intended to protect for all three residences, and given the redeveloped nature of the homes at 307 and 311 Beach Drive, that question need not be answered here to conclude on this point in terms of LCP consistency for the project, as they all would need to be pre-1977 and not redeveloped since to meet the applicable shoreline protection structure tests, and they do not.

With respect to the degree of threat to these Beach Drive structures, it is clear that there have been landslides emanating from the bluff behind the homes (including as recently as 2019 and 2023, as described in the geotechnical reports prepared for the project). And the CDP application materials indicate 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 (which is corroborated by the Commission's Geologist and Coastal Engineer, see **Exhibit 5**). 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 that might meet such tests) appears to be the home at 309 Beach Drive. Even if proven true, and the evidence in the record is inconclusive at this time, the fact that the proposed project protects more than that single home means that the proposed project does not meet the LCP tests that would allow consideration of a shoreline protection structure. As such, and without even going further, the proposed project is inconsistent with the LCP on these points.

In addition, even if the two required LCP tests could be met to allow for a shoreline protection structure to be considered, which they have not, the proposed 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

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<sup>34</sup> Including what appear to be substantial remodels for which County building permits (but no 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.

alternatives. The Applicants' alternatives analysis<sup>35</sup> evaluates six alternatives, including a "do nothing" scenario (i.e., no project is implemented) (Alternative 1), construction of debris flow impact structures near the base of the bluff (Alternative 4), diversion of surface runoff along the Applicants' seaward property line without the proposed pin pier retaining wall (Alternative 5), and the proposed project (Alternative 6). Of the alternatives evaluated by the Applicants, it is clear that Alternative 4 would appear to be the least environmentally damaging. Alternative 4 is described in the Applicants' alternatives analysis:

*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...*

Some form of project akin to the Applicants' Alternative 4 is expected to be less environmentally damaging than the proposed project in that the project would be much more limited in scope, scale, and degree of bluff landform alteration. Specifically, such a project would include some more limited form of foundation/footing to which would be attached mostly above-ground containment elements. Such a project would be degrees of magnitude less invasive to the bluff landform than would be inserting a more than 100-foot long and 40-foot deep retaining wall into the coastal bluff. It would also be more easily adaptable over time than would be the monolithic concrete wall proposed, and could likely be mostly if not completely hidden from public views behind the Beach Drive homes, whereas the top 2-3 feet of the proposed retaining wall would be starkly visible from the time of installation in protected views, where it would prominently modify the natural bluff appearance with what would be perceived as a linear concrete 'beam' at the top of the bluff. And that proposed retaining wall would become even more exposed over time as the bluff eroded around it, first displaying as an 8-foot high wall of concrete at the top edge of the bluff, and then additionally exposing 2.5-foot wide concrete piers at most 3.5 feet apart going down some 40 feet below the 8 feet of solid concrete wall. Such a project does not minimize visual intrusion as is LCP required (see, for example, LUP Policy 6.2.16), but rather would create a significant visual intrusion which is LCP prohibited (see, for example, IP Section 16.10.070(H)(3)(e)) in an LCP-protected and designated scenic area (see, for example, the LCP's LUP Resource and Constraint Map for Visual Resources, available most readily at the County's GISWeb application, and LUP Policy ARC-5.1.2), all of which also adversely affects public recreational visual access inconsistent with the above-referenced Coastal Act provisions. There is little to no doubt that there are less environmentally damaging options that would be more LCP and Coastal Act consistent than the proposed project in this case.

In addition, the proposed project is not expected to actually abate the potential landslide

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<sup>35</sup> 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 **Exhibit 4**).

dangers affecting the Beach Drive homes. Yes, it is true that it should help to retain the bluff materials on the Applicants' property, and thus have some beneficial effects of protecting homes below, but the vast majority of the potential landslide area is actually seaward of the Applicants' property line and the proposed project location. As such, the proposed project would be expected to do little to abate potential landslides emanating along the bluff face below it, where evidence shows almost all landslides here have originated. Notably, Santa Cruz County geotechnical staff (Jeff Nolan, County Geologist, and Rick Parks, Civil Engineer) concluded 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.*

And this finding is consistent with the Applicants' own preliminary geotechnical investigation for the proposed project,<sup>36</sup> 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.*

In other words, the proposed project would not only have significantly more coastal resource impacts than would some type of catchment system located closer to the Beach Drive homes (e.g., the Applicants' Alternative 4), as described above, but the proposed project would actually provide significantly less potential danger abatement at the same time. And this conclusion is shared by the Commission's Coastal Engineer and Geologist.<sup>37</sup> 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 Applicants' proposed project would actually abate the identified threat.

The reason the Applicants dismiss such a lower bluff area alternative is because that type of project would not be located on their property. The Applicants' alternatives analysis states (in relation to Alternative 4):

*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.*

In other words, the Applicants' alternatives analysis deems this option "logistically infeasible" because it would require the project to be built off of the Applicants' property. In drawing such a conclusion, the Applicant's point to the presence of an "intervening property" located on the bluff face between the Applicant's property and downslope

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<sup>36</sup> 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 **Exhibit 4**).

<sup>37</sup> Again, see **Exhibit 5** for an independent analysis of the proposed project by the Commission's Coastal Engineer and Geologist.



properties (i.e., 307, 309, and 311 Beach Drive),<sup>38</sup> and the Applicants indicate (in their February 6, 2024 correspondence) that they:

*...have spoken with the owners of the intervening property owners in an effort to solicit their cooperation but have been rebuffed. The intervening property owners have told the Applicants in no uncertain terms that they will not cooperate in seeking a resolution to the potential landslide hazard to the residences below.*

While that may be true, the reality is that that “intervening property” actually occupies only a small portion of the top of the bluff nearest the Applicants’ property with the property associated with the Beach Drive homes covering most of the slope (about three-quarters), and covering most of the bluff area that has sloughed off in past events (see **Exhibit 1**). Given that the area where an Alternative 4-type of system would be placed would be closer to the Beach Drive homes to maximize its utility and function, such a system would almost assuredly be located on the Beach Drive homeowners’ properties, and not the “intervening property” referred to by the Applicants. In other words, the only infeasibility cited to by the Applicants for an alternative project such as this appears to actually demonstrate a misunderstanding of the applicable property lines in relation to such a potential project. On this point the LCP defines feasibility in an almost identical manner as the Coastal Act, as follows:

*“Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental and technological factors.*<sup>39</sup>

Thus, not only are the property boundaries cited by the Applicants immaterial to the feasibility question, but the Applicants have not identified any actual LCP feasibility constraints that would argue against the less impactful (and, in fact, more protective) alternative. In fact, not only would such an alternative project appear to be significantly less complicated, difficult, expensive and impactful on its surroundings, but the Beach Drive homeowners have an obvious stake in partnering with the Applicants on a project here, and there is nothing in the record to suggest that they are not interested in such a project.<sup>40</sup>

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 proposed 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. In contrast, the less

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<sup>38</sup> This parcel, APN 043-082-50, is visible as the narrow, upper bluff parcel on **Exhibit 1**. According to available evidence, this parcel is owned by S&M Creekside LLC, based in Grants Pass, Oregon.

<sup>39</sup> Coastal Act Section 30108 states: ““Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”

<sup>40</sup> And in fact, at least one such Beach Drive homeowner has commented to the Commission supporting a project to abate the danger to the Beach Drive homes (see email from Elan Scheinman, who identifies himself as the property owner at 303 Beach Drive, in correspondence package for this item).

environmentally damaging feasible alternative (i.e., some variation of the Applicants' Alternative 4), would be located much closer to the Beach Drive homes. Put another way, given the fact set here, the proposed project is inconsistent with these LCP locational requirements, while an alternative project located as close to the Beach Drive homes as possible would be consistent with them.

Finally, 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 proposed project would still lead to the sorts of coastal resource impacts (and LCP and Coastal Act inconsistencies) noted earlier. In addition, those types of impacts would not only be expected to increase over time, but additional natural landform, public view, shoreline processes/sand supply, and public access and recreation impacts could also occur as the site context changes.<sup>41</sup> The Applicants not only have not proposed any sort of mitigation for these impacts (mitigation that is required by the LCP; see LUP Policy 6.2.16 and IP Section 16.10.070(H)(3)(e)), but they thoroughly dismiss the idea that there could be anything more than immaterial impacts,<sup>42</sup> and do not even agree that placing a more than 100-foot wide and 40-foot deep retaining wall with a solid 8-foot cap (that would be exposed 2-3 feet above the slope from installation, with such exposure increasing over time) is landform alteration at all.<sup>43</sup> They are incorrect on all such fronts, including as the proposed project categorically represents a significant alteration of the natural landform, and it is hard to see how a project as invasive as this into the natural bluff would not be considered landform alteration. This is supported by the fact that the LUP specifically recognizes that shoreline protection structures have clear visual resource impacts, and requires that such structures use natural materials and finishes to blend with the character of the area and integrate with the landform (see LUP Policy ARC-5.1.7), which is, again, something that the Applicants have not proposed whatsoever and have instead dismissed altogether.

In sum, the Applicants' proposed project is inconsistent with the LCP and the Coastal Act on multiple levels, and these inconsistencies require that the Commission deny the CDP application. 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

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<sup>41</sup> For example, 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 for this proposed shoreline protection structure 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. 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 and Coastal Act inconsistencies detailed above require denial of the CDP for the proposed project, it is unnecessary at this time for the Commission to fully identify the magnitude of such additional potential impacts.

<sup>42</sup> For example, the Applicants state in their February 6, 2024 correspondence: "Other than temporary impacts associated with construction of the pin pier retaining wall, the only impact to coastal resources is the possibility that the bluff face on the seaward side may eventually erode or landslide, exposing the pin pier retaining wall."

<sup>43</sup> For example, the Applicants state in their February 6, 2024 correspondence: "As the plans for the proposed pin pier retaining wall indicate, there will be no alteration to the natural landform."

Commission is under no obligation to do so.<sup>44</sup> And in this case, the project modifications that would appear necessary 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, including through correcting the deficiencies identified in this report.

### **California Environmental Quality Act (CEQA)**

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

***CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.***  
*[Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*

***Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication.*** ...*(b) This division does not apply to any of the following activities: ... (5) Projects which a public agency rejects or disapproves.*

***CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved.*** *(a) CEQA does not apply to projects which a public agency rejects or disapproves.*

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

Pursuant to Section 15042 of the CEQA Guidelines “a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.” Section 21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in this report, is necessary to avoid

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<sup>44</sup> 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.”).

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. Appendix A – Substantive File Documents<sup>45</sup>**

- Appeal/CDP Application File A-3-SCO-23-0051

#### **B. Appendix B – Staff Contact with Agencies and Groups**

- Santa Cruz County Community Development and Infrastructure Department

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<sup>45</sup> These documents are available for review from the Commission's Central Coast District office.