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Action Deadline: 7/9/2024
Staff: Nolan Clark - SC
Staff Report: 5/24/2024
Hearing Date: 6/13/2024

STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

Appeal Number: A-3-SCO-24-0019

Applicant: Marvin Tseu and Mary Mocus

Appellant: Jeanell Martin

Local Government: Santa Cruz County

Local Decision: Coastal development permit application number 231511 approved by the Santa Cruz County Zoning Administrator on March 15, 2024.

Location: The rear, blufftop yard associated with 735 Seacliff Drive (APN 038-151-11) in the Aptos area of unincorporated Santa Cruz County.

Project Description: After-the-fact recognition of an outdoor kitchen, firepit, and garden wall.

Staff Recommendation: No Substantial Issue

IMPORTANT HEARING PROCEDURAL NOTE

Please note that this is a substantial issue only hearing, and testimony will be taken *only* on the question of whether the appeal raises a substantial issue. Such testimony is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits), so please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application and will then review that application at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does *not* raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

Santa Cruz County approved a CDP that provides for after-the-fact recognition of residential landscaping improvements originally developed without the benefit of a coastal development permit (CDP) at 735 Seacliff Drive in the unincorporated community of Aptos. Specifically, these landscaping elements include an outdoor kitchen with a sink and barbecue, fire pit, and garden wall. The Appellant contends that the County's approval raises LCP consistency questions relating to coastal hazards and unpermitted development. Specifically, the Appellant contends that the approved project violates applicable LCP policies because: 1) the garden wall adjacent to the coastal bluff presents a hazard to residential development at the base of the bluff; and 2) the Applicants' rear-yard deck was recently redeveloped without the benefit of a CDP.

After reviewing the appeal contentions in light of the County's record, staff does not see any significant coastal resource or LCP conformance issues with the project, and recommends the Commission find no substantial issue with respect to the County's approval and therefore decline to take jurisdiction over the CDP application.

With respect to coastal hazards, it appears that the County appropriately applied the LCP's provisions that address bluff setbacks for minor backyard elements like those proposed here, including because this project is for minor landscaping elements which do not on the whole appear to have any significant adverse coastal resource impacts (such as public views, drainage patterns, or slope stability). The County also required confirmation from a certified geologist that the project will not adversely impact drainage. Moreover, the County required these backyard elements' removal in the event of slope instability or future erosion instead of armoring them in place. Thus, the County's approval does not raise a substantial LCP conformance issue with respect to coastal hazards.

And with respect to the rear-yard deck, the County approved a CDP for this deck in 2010, and there is no evidence that it has been redeveloped or otherwise raises any LCP conformance or coastal resource problems of note.

In conclusion, the County’s approval is for some very minor backyard landscaping improvements on a residentially developed lot that does not raise any coastal resource issues for which the Commission should assert its jurisdiction. As a result, staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP conformance issue, and that the Commission decline to take jurisdiction over the CDP application for this project. The single motion necessary to implement this recommendation is found on page 4 below.

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EXHIBITS

Exhibit 1 – Project Site Map

Exhibit 2 – Project Site Images

Exhibit 3 – County Final Local CDP Action Notice and Approved Project Plans

Exhibit 4 – Appeal of County CDP Decision

Exhibit 5 – Applicable LCP Provisions

CORRESPONDENCE

1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that no substantial issue exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission would not take jurisdiction over the underlying CDP application for the proposed project and would not conduct further hearings on this matter, and that the local government CDP decision stands and is thus final and effective. To implement this recommendation, staff recommends a yes vote on the following motion which, if passed, will result in the recommended no substantial issue finding. If the motion fails, then the Commission will have instead found a substantial issue and will instead take jurisdiction over the subject CDP application for future hearing and action. The motion passes only by an affirmative vote of a majority of the Commissioners present.

Motion: *I move that the Commission determine that Appeal Number A-3-SCO-24-0019 **raises no substantial issue** with respect to the grounds on which the appeal has been filed under Section 30603, and I recommend a **yes** vote.*

Resolution to Find No Substantial Issue. *The Commission finds that Appeal Number A-3-SCO-24-0019 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

2. FINDINGS AND DECLARATIONS

A. Project Location, Background, and Description

The County-approved project is located within the rear yard of an existing blufftop parcel developed with a single-family residence, located at 735 Seacliff Drive in the Aptos area of unincorporated Santa Cruz County. This stretch of Seacliff Drive and the homes seaward thereof are located at the top of a coastal bluff with beach-level residential development along Las Olas Drive below.

The County's approval is for after-the-fact recognition of backyard landscaping improvements originally developed without the benefit of a coastal development permit (CDP). The County's action here follows a Santa Cruz County Code Compliance case initiated in June of 2023, which found that these landscaping improvements were constructed without receiving requisite CDP authorization.¹ The County directed the property owner to apply for a CDP to correct the violation, which the property owner did. See the "Violations" section of this report for more information.

The County's approval thus recognizes these landscaping elements, which include an outdoor kitchen with a sink and barbecue, fire pit, and garden wall. The outdoor kitchen

¹ IP Section 13.20.061(B) requires CDP approval for landscaping improvements within 50 feet of a coastal blufftop edge.

is located nearly 50 feet from the edge of the coastal bluff, and the fire pit (approximately 9 feet long, 3 feet wide, and 21 inches tall) and garden wall (approximately 27 feet long, 1 foot wide, and 21 inches tall) are within approximately 12 feet from the edge of the coastal bluff. The fire pit and garden wall both sit landward of existing blufftop vegetation and are out of view from the beach below.

See **Exhibit 1** for a location map, **Exhibit 2** for photographs of the site, and **Exhibit 3** for the approved project plans.

B. Santa Cruz County CDP Approval

On March 15, 2024, the Santa Cruz County Zoning Administrator approved a CDP for the proposed project. The County's Final Local CDP Action Notice (see **Exhibit 3**) was received in the Coastal Commission's Central Coast District Office on April 16, 2024, and the Coastal Commission's ten-working-day appeal period for this action began on April 17, 2024, and concluded at 5 p.m. on April 30, 2024. One valid appeal (discussed below) was received during the appeal period.

C. Appeal Procedures

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

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

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing

on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline.

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.² At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such hearing is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

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

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

² The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no substantial issue..." (California Code of Regulations, Title 14, Section 13115(b)). Section 13115(c) of the Commission's regulations provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

D. Summary of Appeal Contentions

The Appellant contends that the County's approval of the CDP for the project raises LCP consistency questions relating to coastal hazards and unpermitted development. Specifically, the Appellant contends that the approved project violates applicable LCP policies because: 1) the garden wall adjacent to the coastal bluff presents a hazard to residential development at the base of the bluff; and 2) the Applicants' rear-yard deck was recently redeveloped without the benefit of a CDP. Please see **Exhibit 4** for the appeal contentions.

E. Substantial Issue Determination

1. Coastal Hazards

LCP coastal hazards provisions require that most development be set back a certain distance from the top edge of a coastal bluff: either a minimum of 25 feet or the distance necessary to provide a stable building site over a 100-year lifetime of the structure, whichever distance is greater. However, the LCP allows for exceptions to this setback standard for certain minor types of development, including small backyard improvements that otherwise do not raise coastal resource problems. The County found that the proposed backyard improvements meet this test. See **Exhibit 5** for applicable LCP provisions.

The Appellant contends that the approved project is inconsistent with the coastal hazard provisions of the LCP because the fire pit and garden wall adjacent to the blufftop edge present a coastal hazard to residential development sited below the project site³ in the event of slope failure.⁴ As previously noted, the fire pit and garden wall are some 10 to 12 feet from the edge of the coastal bluff. The County found that these backyard elements were permissible because they did not involve any grading or substantial earthwork that would cause any form of bluff instability issues either on the project site at the top of the bluff or for the residences at the base of it.⁵ In fact, the County, as a condition of approval, required the Applicants to submit a letter from the project geologist, prior to exercising the permit, confirming that the garden wall and fire pit will not unfavorably alter drainage patterns relative to the adjacent bluff. In addition, the County also required removal or relocation of these backyard improvements in response to future bluff erosion instead of protecting them in place (e.g., with any form of retaining wall or upper bluff armoring). As such, the County appears to have made reasonable findings under the LCP to support its approval in this case. The project is for

³ As noted earlier, this stretch of Seacliff Drive and the homes seaward thereof are located at the top of a coastal bluff with beach-level residential development along Las Olas Drive below.

⁴ The Appellant claims that John Kasunich, a local geotechnical and coastal engineer, stated concerns about the bluff stability at this site. It must be noted that Mr. Kasunich is not the engineer for this project, nor is he retained by the Appellant, and that these claims were not made directly by Mr. Kasunich in his professional capacity.

⁵ As a condition of this CDP approval, the County did require utility connections to the fire pit to be removed and capped because otherwise it would have required a building permit, and thus the bluff setback exceptions described above would not apply in this case (see IP Section 16.10.070(H)(2) in **Exhibit 5**).

minor landscaping elements which, on the whole, do not appear to have any significant adverse coastal resource impacts (such as on public views, drainage patterns, or slope stability) or raise any substantial LCP conformance issues.

For the above reasons, the County's approval of a CDP for the proposed project does not raise a substantial issue of LCP conformance with respect to coastal hazards.

2. Rear-Yard Deck

The County's LCP requires a CDP for all development within 50 feet of a coastal blufftop edge, mirroring the Commission's regulations on this point. Furthermore, the LCP does not allow for new project approvals unless all violations at the project site are resolved as part of that CDP action. Again, see **Exhibit 5** for applicable LCP provisions.

The Appellant further contends that the Applicants redeveloped their existing rear-yard deck within the last two years without the benefit of a CDP, and this work also should have been included in the County's after-the-fact approval. However, this deck was permitted by the County in 2010⁶, and the County issued an exemption to the Applicants in 2023 for some minor repairs (i.e., fumigation and removal and replacement of two decking planks) to address termites. The County confirmed that the work done was in accordance with their exemption authorization and did not result in a replaced deck. And while it's unclear whether such work was allowed to be exempt given the location within 50 feet of the bluff edge, given its very minor scope, it does not appear that this termite treatment had any significant adverse coastal resource impact or raise any substantial LCP conformance issues. For these reasons as well, the County's approval does not raise a substantial issue of LCP conformance with respect to the rear-yard deck.

3. Violation

As described earlier, LCP violations existed on the subject property consisting of the construction of an outdoor kitchen, fire pit, and garden wall all without the benefit of a CDP. The express purpose of the subject CDP on appeal is to provide after-the-fact CDP authorization of these landscaping elements in order to resolve the Santa Cruz County Code Compliance Case initiated in June of 2023.

Although development took place without prior CDP authorization, the Commission's consideration of this appeal has been based solely upon measuring consistency of the proposed project against the applicable LCP provisions. Commission review and action on this appeal does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of any development undertaken on the subject site without a CDP, or of any other development, except as otherwise expressed herein. By finding no substantial issue in this case, the County's approval of this CDP application subject to terms and conditions, issuance of the CDP, and the Applicants'

⁶ Santa Cruz County issued CDP no. 10-0014 in 2010 for the replacement and expansion of the rear-yard deck.

undertaking the authorized development in compliance with the CDP terms and conditions will result in resolution of the violations.

4. Conclusion

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

With respect to the degree of factual and legal support for the County's approval, the County appropriately applied the LCP's bluff setback provisions against the proposed project, and conditioned it accordingly (including requiring removal of such improvements over time in lieu of armoring or other substantial protection measures). Accordingly, there is adequate factual and legal support for the County's approval, which supports a finding of no substantial issue.

In terms of the second and third factors (the extent and scope of the development as approved or denied by the local government and the significance of the coastal resources affected by the decision, respectively), the project entails very minor rear-yard improvements that are not expected to adversely impact any coastal resources.

With respect to the fourth factor, the County's decision here does not appear to set a precedent for future interpretations since the findings and analysis were specific to this particular project and its set of facts. And finally, this appeal does not raise issues of statewide importance—it only affects some minor landscaping improvements at the rear of a developed property and does not result in any significant coastal resource impacts. The project is a relatively local issue which does not meaningfully affect the State's broader coastal program goals. Accordingly, the fourth and fifth factors considered here further support a finding of no substantial issue.

For the reasons stated above, the Commission finds that Appeal Number A-3-SCO-24-0019 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

3. APPENDICES

A. Substantive File Documents⁷

- Project file for appeal number A-3-SCO-24-0019
- Santa Cruz County Local Coastal Program

B. Staff Contacts with Agencies and Groups

- Santa Cruz County – Community Development and Infrastructure Department
- John Kasunich – Haro, Kasunich and Associates, Inc.

⁷ These documents are available for review from the Commission's Central Coast District office.