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Refer To File # 504443-0001

VIA FEDERAL EXPRESS AND EMAIL

December 9, 2022

Steven Guiney, Zoning Administrator
County of Santa Cruz
Planning Department
701 Ocean Street
Santa Cruz, CA 95060

Re: Continued Hearing on Application No. 211316 (December 16, 2022)
Applicant: Matson Britton Architects
Owners: Kirk Kozlowski and Mary Lacerte
APN: 043-081-13
Address: 266 Cliff Ct., Aptos, CA

Dear Zoning Administrator Guiney:

We continue to represent the applicant, Matson Britton Architects ("Applicant") and the owners of the real property that is the subject of the above referenced application ("Application"), Kirk Kozlowski and Mary Lacerte ("Owners"), with respect to all matters pertaining to the Application. The purpose of this letter is to augment the testimony provided by us at the initial hearing on the Application held on November 18, 2022 ("Initial Hearing").

As we testified at the Initial Hearing, the County of Santa Cruz Planning Department staff has erroneously characterized the pin pier wall that is the subject of the Application as a "shoreline protection structure" as defined in Santa Cruz County Code Section 16.10.040. The proposed pier pin wall will not be constructed at the "shoreline" under any commonly accepted definition of that term. Further, the Santa Cruz County Code definition of shoreline protection structure requires that such structure be "placed in an area where coastal processes operate" in order to be so defined. In her letter of November 16, 2022 submitted for the Initial Hearing record and which responds to the Santa Cruz County Planning Department staff report, Elizabeth Mitchell, the licensed geotechnical engineer retained by the Applicant and Owners to review the staff report, opined that the proposed pier pin wall will not provide any protection to the shoreline and that the area where the wall is proposed to be placed and the bluff it is designed to buttress "is not exposed" to coastal processes. In addition, In his letter of January 12, 2022 submitted for the Initial Hearing Record, Richard Irish, the registered professional engineer retained by the Applicant and Owners to design the pin pier wall, related that

the bottom of the pin piers supporting the proposed wall will be nearly 60 feet above the mean high tide line and opined that “Were coastal erosion processes to progress to the location of the wall, it would fail due to the undermining of the bluff below . . .” Our review of the record of the Initial Hearing reveals that there is no opinion of a licensed professional engineer or geologist (or opinion of any other relevant licensed professional) to refute the opinions proffered by registered professional engineer Richard Irish and licensed geotechnical engineer Elizabeth Mitchell.

In addition to the commonly accepted definitions of shoreline that we cited at the Initial Hearing, the United States Supreme Court and California appellate courts have routinely held that the shoreline is the point of the mean high tide line, not at a point on a bluff that is several hundred feet landward of and significantly above the mean high tide line. In *Borax Consolidated v. Los Angeles* (296 U.S. 10, 22-23 (1935)), the United States Supreme Court held that “by the common law, the shore is ‘confined to the flux and reflux of the sea at ordinary tides’” and that “it [the shoreline] is the land ‘between ordinary high and low water mark, the land over which tides ebb and flow.’” (Emphasis added.) The Supreme Court further held in *Borax* that this common law definition will prevail whenever the sea or bay “is named as a boundary.” Accordingly, to be properly characterized as a shoreline protection structure, its placement must be within the boundary described in *Borax* – “between the ordinary high and low water mark, land over which the tides ebb and flow” – and therefore cannot be at the location proposed for the proposed pier pin wall. Thus, the proposed pier pin wall cannot fall within the Santa Cruz County Code definition of shoreline protection structure.

The California appellate court cases on the subject of the definition of shoreline follow the common law definition of shoreline validated by the United States Supreme Court in the *Borax* case. In *Lechuza Villas West v. California Coastal Commission* (60 Cal. App. 4th 218, 242 (1997)), for example, the court held that the “boundary line between the [owner’s] property and the public tidelands” is an ambulatory line which moves as described in the opinion and that the “shoreline is the line where the plane of the ordinary mean high tide meets the shifting sand from time to time.” (Emphasis added.). Again, the proposed pin pier wall is several hundred feet landward of the mean high tide line, which is the shoreline, and therefore does not fall with the Santa Cruz County Code definition of shoreline protection structure (or any other reasonable definition of shoreline protection structure).

In yet another California appellate court case, in *Littoral Development Co. v. San Francisco Bay Conservation and Development Commission* (24 Cal. App. 4th 1050 (1994)), the court held that “the shoreline of the bay shall be set with reference to the specified level of mean high tide.” (Emphasis added.)

California regulatory agencies have followed in lockstep with the commonly accepted definition of shoreline consistent with the above discussed decisions of the United States Supreme Court and California appellate courts. For example, in the

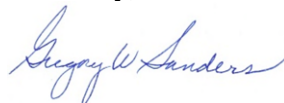
Shoreline Protective Structures Staff Report to the California State Lands Commission, dated April, 2001, the shoreline boundary is defined as “generally a moving boundary identified as the Ordinary High Water Mark.” In addition, the California Coastal Commission in LUP Update Guide, Part 1, Section 9 (Shoreline Erosion and Protective Devices), dated July 31, 2013, “coastal structure,” which is described as essentially a shoreline protection structure, is defined to mean a “structure located at the base of the bluff, such as a seawall, revetment, or rip rap that is located at, or is seaward of the bluff dripline.” (Emphasis added.) In the case of the proposed pier pin wall, it is located well above the base of the bluff and is several hundred feet landward of the ordinary high water mark or mean high tide line and nowhere near the bluff dripline.

In addition to the commonly accepted definition of shoreline, the decisions of the United States Supreme Court and California appellate courts and California regulatory agencies discussed above that validate such definition, statutory law supports our contention that a structure must protect against natural shoreline processes in order to be categorized as a shoreline protection structure, which the proposed pier pin wall does not. For example, the Coastal Act (Pub. Res. Code § 30000, *et seq.*) at Section 30235 provides that “revetments, breakwaters, 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” As discussed above, evidence for the record has been submitted by the Applicant and Owners from a licensed geotechnical engineer that the bluff area where the pin pier wall is proposed to be constructed is not subject to natural shoreline processes. Accordingly, the proposed pier pin wall does not fall within the ambit of Section 30235 which lists typical shoreline protection structures.

Even if the proposed pier pin wall were to be characterized as a shoreline protection structure within the ambit of Section 30235, the record shows that the wall is designed to protect an existing downbluff structure. Thus, if the County of Santa Cruz insists that the proposed pin pier wall is a shoreline protection structure that would alter natural shoreline processes, the County must, as a matter of law, approve the Application and issue a coastal development permit for its construction.

Thank you for your attention to this matter. We will be present at the continued hearing on this matter on December 16 to discuss this letter and respond to any questions you may have.

Sincerely,



Gregory W. Sanders
Nossaman LLP

GWS:jg



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VIA FEDERAL EXPRESS AND EMAIL

December 13, 2022

Steven Guiney, Zoning Administrator
County of Santa Cruz
Planning Department
701 Ocean Street
Santa Cruz, CA 95060

Re: Continued Hearing on Application No. 21136 (December 16, 2022)
Applicant: Matson Britton Architects
Owners: Kirk Kozlowski and Mary Lacerte
APN: 043-081-13
Address: 266 Cliff Ct., Aptos, CA

Dear Zoning Administrator Guiney:

We continue to represent the applicant, Matson Britton Architects ("Applicant") and the owners of the real property that is the subject above referenced application ("Application"), Kirk Kozlowski and Mary Lacerte ("Owners") with respect to all matters pertaining to the Application. This letter augments our letter to you of December 9, 2012 regarding testimony we offered at the initial hearing on the Application held on November 18, 2022 ("Initial Hearing") regarding an offer made by the County planning staff to resolve the drainage issue raised by the staff following a finding that the Application was complete.

At the Initial Hearing, Cove Britton, a representative of the Applicant, and the undersigned testified that at a Microsoft Teams meeting conference call with Matt Machado, Director of Community Development and Infrastructure, who was joined by Carolyn Burke and other members of the County planning staff and Justin Graham of the County Counsel's office, Mr. Machado offered to resolve the drainage issue and that the resolution he offered was accepted by the Applicant and Owners. The Applicant, Owners and the undersigned were stunned to hear Carolyn Burke state at the Initial Hearing that she had no knowledge of the offer made by Mr. Machado and accepted by the Applicant and Owners.

As revealed by the attached Microsoft Teams meeting log, on August 16, 2022 at 3:00 p.m., a Teams meeting conference call ("Teams Conference Call") was hosted by Matt Machado, Director of Community Development and Infrastructure (who was joined by Carolyn Burke and other County planning staff members), and Justin Graham of the County Counsel's office, with Cove Britton, the Owners, Richard Irish, the civil engineer retained by the Owners, and the undersigned joining for the Applicant and Owners. Following a discussion of the

drainage and other issues, Mr. Graham typed into the Teams Conference Call chat at 3:47 p.m. the following proposed condition of approval, as revealed by the Teams Conference Call log, which was represented by Mr. Machado as an offer intended to resolve the drainage issue, as follows:

“Applicant shall be required to certify in writing that they have sufficient legal rights to utilize the entire diversion path as proposed, and shall further be required to execute a written agreement in a form acceptable to the County to defend, indemnify and hold harmless the County for all claims related to or arising out of applicant’s proposed use of the diversion path.”

Mr. Britton, the Owners and the undersigned expressed agreement with the proposed condition of approval and informed Mr. Machado that it was acceptable.

It is clear from the foregoing that the County staff and the Applicant and Owners agreed to a resolution of the drainage issue on August 16, 2022. If you believe it is necessary, Mr. Britton, the Owners and the undersigned are prepared to execute declarations under penalty of perjury that the foregoing is true and correct. It is now disingenuous for the County staff to attempt to renege on the offer to resolve the drainage issue and acceptance of same by the Applicant and Owners. We urge you to find that the drainage issue has been resolved.

We will participate in the December 16, 2022 hearing on the Application to discuss this letter and respond to any questions you may have.

Sincerely,



Gregory W. Sanders
Nossaman LLP

Encl.

GWS:jg

From: Kirk Kozlowski <kkozlowski@scisj.net>

Date: December 9, 2022 at 4:01:06 PM MST

To: Greg Sanders <gsanders@nossaman.com>, Mary Lacerte <mary@creativejuicesdesign.net>, Cove Britton <cove@matsonbritton.com>

Subject: Teams Meeting Log

[8/16 3:00 PM]

Kirk Kozlowski was invited to the meeting.

[8/16 3:00 PM]

Cove Britton (Guest) was invited to the meeting.

[8/16 3:01 PM]

Richard Irish (Guest) was invited to the meeting.

[8/16 3:04 PM]

Mary Lacerte was invited to the meeting.

[8/16 3:10 PM]

Greg Sanders (Guest) was invited to the meeting.

[8/16 3:47 PM] Justin Graham

4) Applicant shall be required to certify in writing that they have sufficient legal rights to utilize the entire diversion path as proposed, and shall further be required to execute a written agreement in a form acceptable to the County to defend, indemnify and hold harmless the County for all claims related to or arising out of applicant's proposed use of the diversion path.

[8/16 3:58 PM]

Mary Lacerte left the chat.

[8/16 3:58 PM]

Greg Sanders (Guest) left the chat.

[8/16 3:59 PM]

Richard Irish (Guest) left the chat.

[8/16 3:59 PM]

Cove Britton (Guest) left the chat.

[8/16 3:59 PM]

8/16 3:59 PM Meeting ended: 59m 40s

[8/16 3:59 PM]

Kirk Kozlowski left the chat.



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VIA EMAIL

December 15, 2022

Steven Guiney, Zoning Administrator
County of Santa Cruz
Planning Department
701 Ocean Street
Santa Cruz, CA 95060

Re: Continued Hearing on Application No. 211316 (December 16, 2022)
Applicant: Matson Britton Architects
Owners: Kirk Kozlowski and Mary Lacerte
Address: 266 Cliff Ct., Aptos, CA

Dear Zoning Administrator Guiney:

We continue to represent the applicant, Matson Britton Architects ("Applicant") and the owners of the real property that is the subject of the above referenced application ("Application"), Kirk Kozlowski and Mary Lacerte ("Owners") with respect to all matters pertaining to the Application. This letter augments our letters to you of December 9 and 13, 2022 regarding testimony offered at the initial hearing on the Application on November 18, 2022.

The Staff Report to the Zoning Administrator on the Application ("Report") cites failure of the proposed pin pier wall to comply with Santa Cruz County Code Section 16.10.070 because, allegedly, the properties adjacent to the subject property are not similarly protected and there is no significant threat to the "existing structure." The interpretation of Section 16.10.070 given in the Report is at least in part in error. The interpretation assumes that "existing structure" as used in that section applies only to structures on which the proposed pin pier wall will be constructed. Nowhere in Section 16.10.070 is there a definition of "existing structure" that limits such structures to the property on which a shoreline protection structure is proposed to be constructed. The Report simply sidesteps the fact that the proposed pin pier wall is designed and is necessary to protect two downbluff homes from erosion and a potential landslide, both of which are "existing structures."

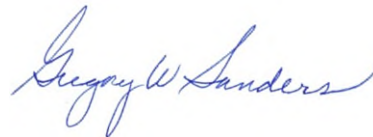
The misinterpretation of Section 16.10.070, coupled with the requirement that adjacent parcels be similarly protected, is preempted by Public Resources Code Section 30235 which provides, in pertinent part, "Revetments, breakwaters, groins, harbor

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.” Since the County planning staff insists on characterizing the proposed pin pier wall as a “shoreline protection structure” (which characterization we strenuously disagree with as discussed in our December 9, 2022 letter to you) it follows and is inescapable that Section 30235 applies.

Historically, the California Coastal Commission interpreted Section 30235 to apply to all structures requiring protection from natural shoreline processes regardless of when constructed. More recently, the Coastal Commission has attempted to interpret Section 30235 to apply only to structures that existed as of the date of enactment of the original Coastal Act in 1972. Either way, the existing structures (which are situated directly below the subject property), the proposed pin pier wall is designed to protect were originally constructed well in advance of enactment of the original Coastal Act – one in 1936 (307 Beach Drive), the other in 1964 (309 Beach Drive), as evidenced by the attached records of the Santa Cruz County Assessor’s Office. Accordingly, the County of Santa Cruz, as a matter of law in accordance with Section 30235, must approve the Application and issue a coastal development permit for the proposed pin pier wall

We will be present at the December 16, 2022 hearing to respond to any questions you may have regarding this letter.

Sincerely,



Gregory W. Sanders
Nossaman LLP

Encl.

GWS:jg



Santa Cruz County Assessor's Office

Parcel Info

APN

04308204

Situs Address

309 BEACH DR,
APTOS , 95003-5103

Class

020-SINGLE RESIDENCE

Site Information

Parcel # 04308204

View NO VIEW

Topography LEVEL

Other Buildings N/A

General Plan

R-UL URBAN
LOW
RESIDENTIAL

**Parcel Size
(sqr-ft)** 4,792

**Parcel Size
(acres)** 0.1100

Zone R-1-6

Water PUBLIC
WATER

Sanitation PUBLIC
SEWER

Building 1 ▼

Year Built 1964

Effective Year 1980

of Units 1

Condition N/A

Concrete 800

Fireplaces 0

Main Area 1776

Room Count 6

Bedrooms 4

Bathrooms (F/H) 2 / 1

Roof COMP SHINGLE

Heat OTHER

Deck 0

Porch 0

Pool N

spa N

Garage 0

Carport 0



Santa Cruz County Assessor's Office

Parcel Info

APN

04308203

Situs Address

307 BEACH DR,
APTOS , 95003-5103

Class

020-SINGLE RESIDENCE

Site Information

Parcel # 04308203

View NO VIEW

Topography N/A

Other Buildings N/A

General Plan

R-UL URBAN
LOW
RESIDENTIAL

**Parcel Size
(sqr-ft)** 6,316

**Parcel Size
(acres)** 0.1450

Zone R-1-6

Water PUBLIC
WATER

Sanitation PUBLIC
SEWER

Building 1 ▾

Year Built 1936

Effective Year 2019

of Units 1

Condition N/A

Concrete 0

Fireplaces 0

Main Area 1407

Room Count 0

Bedrooms 3

Bathrooms (F/H) 2 / 0

Roof SHAKE / WOOD
SHINGLE

Heat N/A

Deck 0

Porch 0

Pool N

spa N

Garage 0

Carport 0