

CALIFORNIA COASTAL COMMISSION

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W8a

STAFF REPORT: APPEAL SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: County of Santa Barbara
LOCAL DECISION: Approval with Conditions
CDP APPEAL NO.: A-4-STB-07-112
APPLICANT: Beach Club Family Trust, Contact Tim Hoctor
APPELLANT: Commissioners Patrick Kruer and Sara Wan
PROJECT LOCATION: 2825 Padaro Lane, unincorporated Santa Barbara County
 (Assessor Parcel No. 005-260-009)

CDP PROJECT DESCRIPTION: Conversion of a previously unpermitted accessory structure into a 1,118 sq. ft. Detached Residential Second Unit (DRSU). The structure would have an average height of 10 feet, six inches.

MOTION & RESOLUTION: Page 5

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends that the Commission determine that a **substantial issue exists** with respect to the appellants' assertions that the approved project is not consistent with the environmentally sensitive habitat area (ESHA), riparian woodland, and monarch butterfly habitat policies of the certified Local Coastal Program (LCP).

The appellants assert that the conversion of an accessory structure to a residential second unit is not consistent with the policies of the Local Coastal Plan, which requires that environmentally sensitive habitat, riparian woodlands, and monarch butterfly habitat be protected. The subject CDP is referred to as following a previous coastal development (County Case No. 07CDH-00000-00007). This previous related CDP authorized several previously unpermitted structures on the subject parcel after-the-fact. However, this related coastal development permit (CDP) was appealed by Commissioners Kruer and Wan as well, and the Commission found that appeal to raise a substantial issue on August 8, 2007. The follow-up *de novo* permit application has not yet been heard by the Commission.

The County's record is unclear as to whether the legalization of the accessory structure itself (which is proposed to be converted to a detached residential second unit (DRSU)) was handled under the previous permit or whether it is intended to be approved after-the-fact under the subject permit. The project description of the previous CDP (07CDH-

00000-00007) “validates” four unspecified accessory structures. Commission staff had initially interpreted that as meaning that the previous CDP was intended to legalize the existence of the accessory structure after-the-fact. However, the project description in the subject CDP refers to the “conversion of a previously unpermitted accessory structure” into a second unit. Since it is unclear, the project description of the subject CDP is assumed to include the legalization of the structure as well as the conversion. Regardless, both the legalization of the structure and the conversion to a second unit are appealed on the same grounds.

The Summerland Community Plan (SCP), a certified component of the County’s LCP, illustrates the presence of a Willow/Sycamore Riparian Environmentally Sensitive Habitat Area on both the west and east sides of Toro Creek, including the subject property. Additionally, the mouth of Toro Creek is identified as Site 96 in the *Monarch Butterfly Overwintering Sites in Santa Barbara County* (Meade, November 1999).

Based on a review of historical aerial photographs of the subject site, it appears that a substantial area of vegetation has been removed within the riparian corridor along Toro Creek. In fact, significant vegetation removal appears to have occurred without the required coastal permits between 2002 and the latter part of 2004 across the subject property, particularly at the mouth of Toro Creek adjacent to the unpermitted structures.

Although the County found that the subject accessory structure is located at least 100 ft. from the top of creek bank; the County’s analysis failed to address the distance of the proposed development from either the currently or previously existing riparian ESHA located along the creek. The currently existing riparian ESHA on site is located on either side of Toro Creek and is significantly wider than the creek itself. In addition, based on a review of the 2002 aerial photographs of the subject site, the proposed development is located less than 100 ft. from the previously existing riparian habitat on site, which, because it was removed without authorization, must be treated as remaining for purposes of delineating ESHA on the site, and would not provide for an adequate setback. Further, the County failed to analyze the adverse impacts to ESHA that occurred as a result of the original construction of the unpermitted structure.

Note, the unpermitted ESHA removal that occurred independent of the unpermitted construction of the subject development is not included as part of the development approved by the County that is now on appeal. This issue has been reported to the Commission’s Enforcement Unit and will be addressed as a separate matter.

Thus, for the reasons discussed above, the appeals raise substantial issues with regard to the consistency of the approved project with environmentally sensitive habitat areas, riparian woodland and monarch butterfly habitat.

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EXHIBITS

- Exhibit 1.** Vicinity Map
 - Exhibit 2.** Parcel Map
 - Exhibit 3.** Project Plans
 - Exhibit 4.** Site Photograph
 - Exhibit 5.** Final Local Action Notice
 - Exhibit 6.** Commissioner Appeals
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SUBSTANTIVE FILE DOCUMENTS: Santa Barbara County Coastal Plan (January 1982; with updates through 1999); Santa Barbara County Coastal Zoning Ordinance, Article II, Chapter 35 of the County Code; Toro Canyon Plan (December 9, 2004); *Monarch Butterfly Overwintering Sites In Santa Barbara County, California* (Daniel Meade, November 1999)

I. APPEAL JURISDICTION AND PROCEDURES

A. APPEAL JURISDICTION

Under Section 30603 of the Coastal Act, a local government's approval of a coastal development permit may be appealed to the Commission if it authorizes development that is located within the appealable areas, such as those located between the sea and the first public road paralleling the sea; 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 greater; on state tidelands; or along or within 100 feet of any wetland, estuary, or stream. Further, any development approved by a County that is not designated as the principal permitted use within a zoning district may also be appealed to the Commission, irrespective of its geographic location within the coastal zone. Finally, local approval or denial of development that constitutes major public works or major energy facilities may also be appealed to the Commission.

In this case, the project site is located between the first public road and the sea and, therefore, within the geographic appeals area of the County's jurisdiction as shown on the Post Local Coastal Program (LCP) Certification Permit and Appeal Jurisdiction map (Santa Barbara County Coastal Zone Map Sheet 126) certified for the County of Santa Barbara. Thus, the approved development is appealable to the Commission.

B. APPEAL PROCEDURES

The Coastal Act provides that after certification of Local Coastal Programs, a local government's actions on Coastal Development Permits in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal permit actions. During a period of 10 working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

1. Grounds for Appeal

The grounds for appeal of development approved by the local government and subject to appeal to the Commission shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in the Coastal Act (Section 30603[b][1] of the Coastal Act).

2. Substantial Issue Determination

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of this sort unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that a substantial issue exists with respect to the grounds of the appeal, a substantial issue is deemed to exist unless three or more Commissioners wish to hear arguments and vote on the substantial issue question. If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. Pursuant to Section 13117

of the Commission's regulations, the only persons qualified to testify before the Commission at the substantial issue stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. It takes a majority of Commissioners present to find that no substantial issue is raised by the appeal.

3. De Novo Permit Review

If a substantial issue is found to exist, the Commission will evaluate the project de novo. The Commission's de novo review may occur at the same meeting as the substantial issue portion of the appeal hearing or at a subsequent meeting. If the de novo portion of the appeal hearing will occur at a subsequent meeting, the Commission will continue the appeal hearing after finding the appeal to raise a substantial issue. The applicable test for the Commission to consider in its de novo review of the proposed project is whether the proposed development is in conformity with the certified Local Coastal Program and, if the development is between the sea and the first public road paralleling the sea, the public access and public recreation policies of the Coastal Act. If the proposed project is considered de novo, testimony may be taken from all interested persons.

C. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

On July 3, 2007, the Planning Director for the County of Santa Barbara approved Coastal Development Permit No. 07CDP-00000-00063 to allow the conversion of a previously unpermitted accessory structure into a 1,118 sq. ft. Detached Residential Second Unit. The Notice of Final Action for the project was received by Commission staff on August 16, 2007 (Exhibit 5). A ten working day appeal period was set and notice provided beginning August 17, 2007 and extending through August 30, 2007.

An appeal of the County's action was filed by Commissioners Patrick Kruer and Sara Wan on August 30, 2007 (Exhibit 6), during the appeal period. Commission staff notified the County, the applicant, and all interested parties that were listed on the appeals. On August 30, 2007 Commission staff sent a request that the County provide its administrative record for the permits. The administrative record has not been received as of the date of this report.

II. STAFF RECOMMENDATION FOR SUBSTANTIAL ISSUE

MOTION I: *I move that the Commission determine that Appeal No. A-4-STB-07-112 raises NO substantial issue with respect to the grounds on which the appeals have been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local actions will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-4-STB-07-112 presents a substantial issue with respect to the grounds on which the appeals have been filed under §30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

**III. FINDINGS AND DECLARATIONS FOR SUBSTANTIAL
ISSUE**

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION

On July 3, 2007, the Planning Director of the County of Santa Barbara undertook final discretionary action to allow the conversion of a previously unpermitted accessory structure into a 1,118 sq. ft. Detached Residential Second Unit (DRSU) at 2825 Padaro Lane, Carpinteria (unincorporated Santa Barbara County). The structure would have an average height of 10 feet, six inches.

The subject CDP is referred to as following a previous coastal development permit (County Case No. 07CDH-00000-00007). This previous related CDP authorized several previously unpermitted structures on the subject parcel after-the-fact. However, this related coastal development permit (CDP) was appealed by Commissioners Kruer and Wan as well, and the Commission found that appeal to raise a substantial issue on August 8, 2007. The follow-up *de novo* permit application has not yet been heard by the Commission.

The County's record is unclear as to whether the legalization of the accessory structure itself (which is proposed to be converted to a detached residential second unit (DRSU)) was handled under the previous permit or whether it is intended to be approved after-the-fact under the subject permit. The project description of the previous CDP (07CDH-00000-00007) approves an approximately 151 sq. ft. accessory structure attached to the subject structure to be used as a gym and "validates" four unspecified accessory structures. Commission staff had initially interpreted that to mean that the previous CDP was intended to legalize the existence of the accessory structure that is the subject of this appeal after-the-fact. However, the project description in the subject CDP refers to the

“conversion of a previously unpermitted accessory structure” into a second unit. Since it is unclear, the project description of the subject CDP is assumed to include the legalization of the structure as well as the conversion. Regardless, both the legalization of the structure and the conversion to a second unit are appealed on the same grounds.

B. BACKGROUND

The subject parcel is located at 2825 Padaro Lane, within the certified Summerland Community Plan area, Santa Barbara County (Exhibit 1). The 17.25-acre bluff top parcel (Assessor Parcel No. 005-260-009, Exhibit 2) is zoned *Residential*, 3 acre minimum lot size (3-E-1).

There are a number of unpermitted structures on the site. The County’s analysis for the related coastal development permit (County Case No. 07CDH-00000-00007) reported the following with regard to the permit history of the site:

According to a Historic Resources Report drafted by San Buenaventura Research Assoc. and dated March, 2007, the existing main residence and accessory structure (to be validated as a [Detached Residential Second Unit] DRSU under separate permit) were probably constructed between 1942 and 1944 and subsequently moved to the subject property sometime in the late 1940’s (before zoning was required in this area.) According to the same report, the existing garage/carport was probably constructed during the 1970’s or 1980’s. No permit history can be found in the County files for any of the structures onsite...

The County’s staff report states that all of “the existing structures are set back a sufficient distance so as not to be within the 75 year cliff retreat distance.”

Toro Canyon Creek is a blue-line stream that crosses the eastern side of the subject property and outlets to the ocean east of the approved development. The Summerland Community Plan states that the mouth of Toro Canyon Creek supports a structurally diverse riparian community, identified as Willow/Sycamore Woodland, dominated by western sycamore, arroyo willow, and coast live oak. This riparian woodland is specifically identified as environmentally sensitive habitat in the Summerland Community Plan.

Additionally, the mouth of Toro Creek is identified as Site 96 in the *Monarch Butterfly Overwintering Sites in Santa Barbara County* (Meade, November 1999). The site is reported to include riparian woodland habitat, including eucalyptus, sycamore, cottonwood, and willows. The Meade report describes the site as “transitory.” During the survey “a few patrolling butterflies were observed at this site, but no clusters of butterflies were found.” The term “transitory” is defined in the Mead report as (pg. 6):

Transitory – Butterflies that are moving along the coast but stop in locations nightly are called transitory. Transitory clusters are formed from butterflies that move during the day and find a roosting site at night that is different from the previous night. Transitory aggregation sites may form and disperse in a particular tree or location within the course of one week.

Based on a review of historical aerial photographs of the subject site, it appears that a substantial area of vegetation has been removed within the riparian corridor along Toro Creek. In fact, significant vegetation removal appears to have occurred without the required coastal permits between 2002 and the latter part of 2004 across the subject property, particularly at the mouth of Toro Creek adjacent to the subject accessory structure. The unpermitted vegetation removal that occurred independent of the unpermitted construction of the subject structures is not part of the development approved by the County that is now on appeal. This issue has been reported to the Commission's Enforcement Unit and will be addressed as a separate matter.

C. PERMIT HISTORY

On July 3, 2007, the Planning Director of the County of Santa Barbara approved a coastal development permit (07CDP-00000-00063) to convert a previously unpermitted accessory structure into a 1,118 sq. ft. residential second unit, subject to 13 conditions of approval.

The County ran a local appeal period for ten calendar days following the date of the Planning Director's decision. No local appeals were filed.

Commission staff received the Notice of Final Action for the Planning Director's approval of the Coastal Development Permit (07CDP-00000-00063) on August 16, 2007. A 10-working day appeal period was set, extending to August 30, 2007. Appeals were received from Commissioners Patrick Kruer and Sara Wan on August 30, 2007, within the 10-working day appeal period.

On June 18, 2007, the Zoning Administrator for the County of Santa Barbara approved Coastal Development Permit No. 07CDH-00000-00007 and 07CUP-00000-00019 to validate the remodel and construction of an addition to an existing residence, demolish several unpermitted structures, relocate existing unpermitted structures, validate several unpermitted structures, and allow a watchman's trailer to remain in its location for up to one year. An appeal of the County's action was filed by Commissioners Kruer and Wan during the appeal period, on the grounds that the approved development did not conform with the policies of the Local Coastal Plan which requires that environmentally sensitive habitat, riparian woodlands, and monarch butterfly habitat be protected. Substantial issue was determined to exist on this related permit by the Commission on August 8, 2007. The follow-up de novo permit application has not yet been heard by the Commission.

D. APPELLANTS' CONTENTIONS

Appeals were filed by Commissioners Kruer and Wan for Coastal Development Permit 07CDP-00000-00063. The appeals contend that the approved project is not consistent with the provisions of the certified LCP with regard to the protection of environmentally sensitive habitat areas, riparian woodland, and monarch butterfly habitat. The grounds for appeal are summarized below. The full text of each appeal is provided in Exhibit 6.

The appellants contend that the project is inconsistent with the County of Santa Barbara's Local Coastal Program (LCP) policies regarding environmentally sensitive habitat areas, monarch butterfly habitat and riparian habitat. Specifically, LCP Policies 1-1, 1-2, 9-22, 9-23, 9-35, 9-36; Coastal Act Sections 30107.5 and 30240 as incorporated into the LCP pursuant to Policy 1-1; Article II of the Zoning Code Sections 35-53, 35-97.3, 35-97.7, 35-97.18; and Summerland Community Plan Policies BIO-S-1, BIO-S-1.2, BIO-S-3, BIO-S-3.2, BIO-S-4, BIO-S-4.1, and BIO-S-7. Taken together, these policies limit development in and around environmentally sensitive habitat areas, riparian woodlands, and monarch butterfly habitat. Additionally, these policies provide that development must be sited and designed to prevent impacts to these resources.

The County has indicated that the only structures believed to have been constructed prior to the effective date of the Coastal Act are the existing main residence and the accessory structure which is now proposed for conversion to a detached residential second unit (DRSU). Though these structures are thought to have been constructed in the late 1940s, the County did not specify whether they were built in compliance with the laws at the time. There is a reference in the project description to convert the "previously unpermitted accessory structure" which implies that it may not have received necessary approvals at that time.

The appellants contend that since the accessory structure has not been identified as a legally constructed structure, then the current after-the-fact approval, and/or conversion, of the structure is subject to the existing certified provisions of the LCP. Therefore, the accessory structure can only be approved if it meets all of the applicable certified standards regarding riparian, monarch butterfly, and environmentally sensitive habitat areas.

The appellants further contend that the County's analysis is flawed because it did not use the appropriate baseline regarding the extent of ESHA on the property. The County's analysis did not address the loss of riparian woodland and monarch butterfly habitat that may have resulted from the original placement of the unpermitted structure, because the County's baseline environmental conditions were determined based on current conditions (e.g., previous grading and/or habitat removal in association with this structure was not considered an impact).

The establishment of baseline environmental conditions is further complicated by the unpermitted removal of ESHA on the site. Based on photographic records, it appears that unpermitted vegetation removal has occurred in the riparian woodland and monarch butterfly ESHA within and immediately adjacent to the subject structure sometime between 2002 and the end of 2004. Because this removal occurred without permits, the approval of this structure must be determined in conjunction with the historic extent of ESHA. As a result, the subject structure would need to meet the required ESHA buffer from the *pre-disturbed* canopy.

The appeal further contends that in addition to utilizing an inappropriate baseline, the County's analysis measures 100 feet from the top of the creek bank, rather than from the ESHA as required in SCP Action BIO-S-1.2. Although the County determined that the accessory structure is located at least 100 ft. from the top of creek bank, the County's

analysis failed to address the distance of the proposed development from either the existing riparian ESHA located along the creek or the riparian ESHA as it existed prior to its unpermitted removal.

The appellants also contend that the approval of the accessory structure in its existing location is inconsistent with the riparian, monarch butterfly, and environmentally sensitive habitat areas because it does not meet setback requirements from ESHA, riparian, or monarch butterfly habitat. Based on a review of the 2002 aerial photographs of the subject site, the subject accessory structure is located less than 100 ft. from the previously existing riparian habitat on site and therefore would not provide for an adequate setback or provide adequate protection of these habitat areas.

E. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for an appeal is whether a substantial issue exists with respect to the grounds raised by the appellants relative to the approved development's conformity to the policies contained in the certified County of Santa Barbara Local Coastal Program (LCP) or the public access policies of the Coastal Act.

The appellants are appealing the project based on the project's impacts to riparian woodland, monarch butterfly habitat, and designated environmentally sensitive habitat. The appellants assert that the project is not consistent with the policies of the Local Coastal Plan designed to protect environmentally sensitive habitat areas, riparian woodlands, and monarch butterfly habitat. The Commission finds that a substantial issue exists with respect to the grounds on which the appeals have been filed because the appeals raise significant questions about whether the approved project is consistent with policies of the LCP for the specific reasons discussed below.

1. Local Coastal Program (LCP) Policies

The appellants contend that the project, as approved by the County does not conform to the policies of the LCP with regard to environmentally sensitive habitat areas (ESHA), riparian woodlands, and monarch butterfly habitat. The appellants identify potential inconsistencies with the following LCP policies, including the Summerland Community Plan (SCP) which is a certified component of the LCP:

Policy 1-1: All Chapter 3 policies of the Coastal Act have been incorporated in their entirety in the certified County LUP as guiding policies pursuant to Policy 1-1 of the LUP.

Section 30107.5 and Article II, Section 35-58 of the certified LCP state:

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

Section 30240 of the Coastal Act states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Policy 1-2 (Resource Protection):

Where policies within the land use plan overlap, the policy which is most protective of coastal resources shall take precedence.

Policy 9-22 Butterfly Trees:

Butterfly trees shall not be removed except where they pose a serious threat to life of property, and shall not be pruned during roosting and nesting season.

Policy 9-23 Butterfly Trees:

Adjacent development shall be set back a minimum of 50 feet from the trees.

Policy 9-35 Native Plant Communities (e.g., individual oak trees):

Oak trees, because they are particularly sensitive to environmental conditions, shall be protected. All land use activities, including cultivated agriculture and grazing, should be carried out in such a manner as to avoid damage to native oak trees. Regeneration of oak trees on grazing lands should be encouraged.

Policy 9-36 Native Plant Communities:

When sites are graded or developed, areas with significant amounts of native vegetation shall be preserved. All development shall be sited, designed, and constructed to minimize impacts of grading, paving, construction of roads or structures, runoff, and erosion on native vegetation. In particular, grading and paving shall not adversely affect root zone aeration and stability of native trees.

Sec. 35-53. Overlay District Designations and Applicability. (*in relevant part*)

...If any of the provisions of the overlay district conflict with provisions of the zoning district regulations, the provisions which are most restrictive shall govern... The provisions of the ESH Overlay District are more restrictive than any base zone district and therefore the provisions of the ESH shall govern over the regulations of any base zone or other overlay district.

Sec. 35-97.3. Identification of Newly Documented Sensitive Habitat Areas.

If a newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District, is identified by the County on a lot or lots during application review, the provisions of Secs. 35-97.7. - 35-97.19. shall apply. The County will periodically update the application of the ESH Overlay District to incorporate these new habitat areas (including the 250 foot area around the habitat).

Sec. 35-97.7. (Conditions on Coastal Development Permits in ESHA):

A coastal development permit may be issued subject to compliance with conditions set forth in the permit which are necessary to ensure protection of the habitat area(s). Such conditions may, among other matters, limit the size, kind, or character of the proposed work, require replacement of vegetation, establish required monitoring procedures and

maintenance activity, stage the work over time, or require the alteration of the design of the development to ensure protection of the habitat. The conditions may also include deed restrictions and conservation and resource easements. Any regulation, except the permitted or conditionally permitted uses, of the base zone district may be altered in furtherance of the purpose of this overlay district by express condition in the permit.

Sec. 35-97.18. Development Standards for Native Plant Community Habitats.

Examples of such native plant communities are: coastal sage scrub, chaparral, coastal bluff, closed cone pine forest, California native oak woodland (also individual oak trees), endangered and rare plant species as designated by the California Native Plant Society, and other plants of special interest such as endemics.

1. Oak trees, because they are particularly sensitive to environmental conditions, shall be protected. All land use activities, including cultivated agriculture and grazing, should be carried out in such a manner as to avoid damage to native oak trees. Regeneration of oak trees on grazing lands should be encouraged.

2. When sites are graded or developed, areas with significant amounts of native vegetation shall be preserved. All development shall be sited, designed, and constructed to minimize impacts of grading, paving, construction of roads or structures, runoff, and erosion on native vegetation. In particular, grading and paving shall not adversely affect root zone aeration and stability of native trees.

Summerland Community Plan (SCP) Policy BIO-S-1 ESHA:

Environmentally Sensitive Habitat areas within the Community Plan Study area shall be protected, and where appropriate, enhanced.

Summerland Community Plan (SCP) Action BIO-S-1.2. ESHA:

All new development within 100' of an Environmentally Sensitive Habitat, including but not limited to, riparian, oak or willow woodlands, and coastal sage scrub shall be required to provide for setbacks or undeveloped buffer zones (possibly through open space easements) from these habitats. Staff shall refer to the Summerland Biological Resources Map for information on the location of native habitats, as well as referring to other available data (i.e., other maps, studies or observations). Installation of landscaping with compatible native species may be required within the buffer zone to offset impacts to sensitive habitats from development and increased human activities onsite. If the project would result in potential disturbance to the habitat, a restoration plan shall be required. When restoration is not feasible onsite, offsite restoration may be considered.

Summerland Community Plan (SCP) Policy BIO-S-3. Monarch Butterfly Habitat:

Monarch butterfly roosting habitats shall be preserved and protected.

Summerland Community Plan (SCP) Action BIO-S-3.2. Monarch Butterfly Habitat:

Prior to issuance of a CDP or LUP for development within 200' of known or historic butterfly roosts, RMD shall determine if the proposed project would have the potential to adversely impact monarch butterfly habitat. This shall be determined based on the proximity to known, historic, or potential butterfly trees. The Summerland Biological Resources map shall be considered in determining proximity as well as other available information and maps. In the event the proposed project does have the potential to adversely impact monarch butterfly habitat, the applicant shall submit to DER a butterfly Roost Protection Plan. This plan shall be developed at the applicant's expense and shall be included on any grading designs. The plan shall include the following information and measures:

a. The mapped location of the windrow or cluster of trees where monarch butterflies are known, or have been known, to aggregate;

b. A minimum setback of 50 feet from either side of the roost shall be noted on the plan. Buffers surrounding potential roosts may be increased from this minimum, to be determined on a case by case basis. A temporary fence shall be installed at the outside of the buffer boundary. All ground disturbance and vegetation removal shall be avoided within this buffer region; and

c. Native vegetation shall be maintained around this buffer.

Summerland Community Plan (SCP) Policy BIO-S-4. Monarch Butterfly Habitat:

Trimming or clearing of vegetation within 50' of the Monarch Butterfly Habitat located adjacent to Via Real and Lambert Road or along riparian habitats shall not occur without the review and approval of the Resource Management Department.

Summerland Community Plan (SCP) Action BIO-S-4.1. Monarch Butterfly Habitat:

A trimming or clean-up plan shall be approved by the County Resource Management Department and shall include supervision by a qualified biologist.

Summerland Community Plan (SCP) Policy BIO-S-7. Riparian Habitat:

Riparian habitat areas shall be protected from all new development and degraded riparian habitats shall be restored where appropriate.

2. Site Characteristics and LCP Policy Discussion

Toro Creek crosses the eastern side of the subject property and outlets to the ocean east of the proposed development. The Summerland Community Plan states that the mouth of Toro Canyon Creek supports a structurally diverse riparian community, identified as Willow/Sycamore Woodland, dominated by western sycamore, arroyo willow, and coast live oak.

Figure 22 of the Summerland Community Plan (SCP), a certified component of the County's LCP, illustrates the presence of Willow/Sycamore Riparian Environmentally Sensitive Habitat Area on both the west and east sides of Toro Creek, including the subject property. Additionally, the mouth of Toro Creek is identified as Site 96 in the *Monarch Butterfly Overwintering Sites in Santa Barbara County* (Meade, November 1999). The site is reported to include riparian woodland habitat, including eucalyptus, sycamore, cottonwood, and willows with a rating of "good" regarding habitat health. This report describes the site as "transitory." During the survey "a few patrolling butterflies were observed at this site, but no clusters of butterflies were found." The term "transitory" is defined in the Mead report as (pg. 6):

Transitory – Butterflies that are moving along the coast but stop in locations nightly are called transitory. Transitory clusters are formed from butterflies that move during the day and find a roosting site at night that is different from the previous night. Transitory aggregation sites may form and disperse in a particular tree or location within the course of one week.

The Meade report (1999) emphasizes the need to protect autumnal and transitory sites in the following manner (pg. 8):

Autumnal aggregation sites (e.g. Canada de Santa Anita, Hollister Ranch, Site 41) and transitory sites (e.g., Cypress Ridge, Site 30) should be protected. Without the autumnal and transitory sites it is likely that Monarch butterfly habitat mortality will increase. These habitats provide valuable layover and shelter locations while the butterflies move along the coast. Even though a site may have only 30 butterflies at a given time, the number of butterflies that move through the site during the season may be in the tens-of-thousands. Autumnal aggregation sites directly contribute individuals to the permanent aggregation sites. If new autumnal and transitory sites are found, they should also be protected.

Though the site is located just outside of the defined boundaries of the Toro Canyon Plan (a certified component of the County's LCP), Toro Creek is also discussed within the Toro Canyon Plan. Specifically, the Toro Canyon Plan states that butterfly trees and riparian woodland at the mouth of Toro Creek (which is partially located on the subject site) is environmentally sensitive habitat. Additionally, the Toro Canyon Plan states "Several birds that are listed as Species of Special Concern, including yellow warbler, yellow breasted chat, Allen's hummingbird, and Pacific-slope flycatcher, are known to use Toro Creek during migration and/or nesting periods (Kisner 1998)."

The County's March 25, 2007 staff report completed for the previous CDP (07CDH-00000-00007) indicates that the only structures believed to have been constructed on the site prior to the effective date of the Coastal Act are the existing main residence and the subject accessory structure. Though these structures are thought to have been constructed in the late 1940s, the County did not specify whether they were built in compliance with the laws in existence at that time. The staff report concludes that no permit history can be found in the County files legalizing any of the existing structures on site.

Under the certified LCP, the riparian woodland along Toro Canyon Creek is specifically described as a diverse willow/woodland and identified as environmentally sensitive habitat. When evaluating development set backs, an "on the ground" determination of ESHA cannot overlook the loss of ESHA that resulted from unpermitted removal; otherwise, the permitting system would reward unpermitted removal of ESHA. Such is the case on the subject property.

The ESHA protection policies included in the LCP would need to be applied to the extended footprint of the entire ESHA prior to its removal. The LCP only allows uses dependent on the ESHA within the ESHA. Additionally, the LCP includes policies that require development adjacent to ESHA to be designed and located in a manner that will avoid adverse impacts to habitat resources, including measures such as setbacks, buffers, grading and water quality controls. The LCP also provides specific development standards by ESHA type.

All of the Chapter 3 policies of the Coastal Act have been incorporated in their entirety in the certified LCP as guiding policies pursuant to Policy 1-1 of the LCP. Section 30240 of the Coastal Act, incorporated into the LCP, requires the protection of environmentally sensitive habitat areas against any significant disruption of habitat values, and no development may be permitted within ESHA except for uses that are dependent on the

resource. Section 30240 further requires development adjacent to ESHA to be sited and designed to prevent impacts that would significantly degrade ESHA and to be compatible with the continuance of the habitat areas.

The LCP policies applied together require measures to protect environmentally sensitive habitat areas, riparian woodlands, and monarch butterfly habitat. LCP Policies 1-2, 9-22, 9-23, 9-36, and Coastal Act Section 30240, as incorporated by LCP Policy 1-1; Zoning Ordinance Sections 35-97.7 and 35-97.18; and Summerland Community Plan policies BIO-S-1, BIO-S-1.2, BIO-S-3, BIO-S-3.2, BIO-S-4, and BIO-S-4.1 necessitate measures including siting the project with setbacks and buffers to prevent impacts which would degrade these sensitive resources.

3. Project Impacts

As discussed previously, the approved coastal development permit (07CDP-00000-00063) allows for the conversion of a previously unpermitted accessory structure into a 1,118 sq. ft. Detached Residential Second Unit. The subject CDP is referred to as following a previous coastal development (County Case No. 07CDH-00000-00007). This previous related CDP authorized several previously unpermitted structures on the subject parcel after-the-fact. However, this related coastal development permit (CDP) was appealed by Commissioners Kruer and Wan as well, and the Commission found that appeal to raise a substantial issue on August 8, 2007. The follow-up *de novo* permit application has not yet been heard by the Commission.

The County's record is unclear as to whether the legalization of the accessory structure itself (which is proposed to be converted to a DRSU) was handled under the previous permit or whether it is intended to be approved after-the-fact under the subject permit. The project description of the previous CDP (07CDH-00000-00007) approves an approximately 151 sq. ft. accessory structure attached to the detached residential second unit (DRSU) to be used as a gym and "validates" four unspecified accessory structures. Commission staff had interpreted that the previous CDP was intended to legalize the existence of the accessory structure after-the-fact. However, the project description in the subject CDP refers to the "conversion of a previously unpermitted accessory structure" into a second unit. Since it is unclear, the project description of the subject CDP is assumed to include the legalization of the structure as well as the conversion. Regardless, both the legalization of the structure and the conversion to a second unit are appealed on the same grounds.

Based on a review of historical aerial photographs of the subject site, it appears that a substantial area of vegetation has been removed within the riparian corridor along Toro Creek. In fact, significant vegetation removal appears to have occurred without the required coastal permits between 2002 and the latter part of 2004 across the subject property, particularly at the mouth of Toro Creek adjacent to the unpermitted structures. Additionally, 1973 aerial photos in the Commission's records indicate the presence of structures in the approximate location of the main residence and accessory structure, but these structures appear to be within or partially underneath a more extensive eucalyptus/riparian canopy (Exhibit 4).

Although the County found that the subject accessory structure is located at least 100 ft. from the top of creek bank; the County's analysis failed to address the distance of the proposed development from either the currently or previously existing riparian ESHA located along the creek. The currently existing riparian ESHA on site is located on either side of Toro Creek and is significantly wider than the creek itself. In addition, based on a review of the 2002 aerial photographs of the subject site, the proposed development is located adjacent to the previously existing riparian habitat on site and would not provide for the required less than 100 ft. setback. Further, the County failed to analyze the adverse impacts to ESHA that may have occurred as a result of the original construction of the unpermitted structure. For instance, on the Commission's 1973 aerial photographs for this area, the subject structure appears to be partially within a more extensive eucalyptus/riparian canopy.

The County's analysis concludes structures on site, including the subject accessory structure, may be "validated" because this "would not result in additional impacts to biological resources over existing conditions." However, this analysis is based on the incorrect premise that the current disturbed condition of the site should be used as a baseline for assessing impacts to ESHA. However, since the County has indicated that this structure is unpermitted, then the structure would not be considered vested development. Thus, the after-the-fact approval of the structure must include an analysis of the impacts to ESHA that occurred at the time of construction. However, in its approval of the project, the County incorrectly found that no adverse impacts to ESHA were expected to result from the "validation" of the unpermitted structure since any impacts to ESHA had already occurred. Any development on the property must be set back 100 feet from ESHA as required by SCP Action BIO-S-1.2. In this case, the approved CDP does not prohibit the placement of an accessory structure adjacent to ESHA, or provide for adequate setback from riparian vegetation.

As a result, this structure needs to meet the 100-ft. buffer from the *pre-disturbed* riparian canopy. Though additional investigation will need to be undertaken to assess and map the previous ESHA canopy, preliminary review of the site plan (Exhibit 3) and historic photos demonstrate that this structure would clearly be within this 100-ft. buffer, or partially within the ESHA, inconsistent with the provisions of the certified LCP.

The project description specifically states that no grading would be necessary and no trees would be removed because the structure is existing. However, grading and vegetation removal appear to have already occurred as a direct result of the original construction of the unpermitted structures approved by the County. Since these were unpermitted activities, these impacts must be addressed by the permit.

With regard to butterfly habitat, the County's analysis indicates that a stand of eucalyptus trees located at the mouth of West Toro Canyon Creek is identified in the Summerland Community Plan as sensitive habitat and as Monarch Butterfly Site #96 by Dr. Dan Meade. The analysis concludes that this is insignificant because:

However, the project components would be located approximately 200 feet from the eucalyptus stand. A site assessment drafted by Dr. Meade (May, 2006) states: "Since a monarch butterfly aggregation is not known at the site presently, and has not been known to occur at the site for fifteen years, it is likely that the proposed project will

result in no significant impact to monarch butterflies. Additionally, the designated historic aggregation site #96 at Loon Point is within the sensitive habitat associated with the creek, and would not be affected by anticipated project activities that are outside of the riparian tree canopy.

LUP Policy 9-22 states that “Butterfly trees shall not be removed except where they pose a serious threat to life of property...” and LUP Policy 9-23 states that “Adjacent development shall be set back a minimum of 50 feet from the trees.” The County’s ESHA setback analysis for “validation” of the unpermitted structures on the site did not analyze the distance of the proposed development from the existing or previous extent of monarch butterfly ESHA that existed on site prior to the unpermitted development. However, based on a review of historical aerial photographs of the site from 2002, 2004, and 2006, it appears that the subject structure may be located less than 50 ft. from monarch butterfly habitat. Therefore, the approved development would not be consistent with the LCP ESHA protection requirements.

Thus, for the reasons discussed above, a substantial issue exists regarding the approved development’s consistency with the LCP policies regarding environmentally sensitive habitat areas, riparian woodland and monarch butterfly habitat.

F. CONCLUSIONS REGARDING SUBSTANTIAL ISSUE

The purpose of the substantial issue determination is to establish whether a substantial question is raised with respect to the appellants’ assertions that the project does not conform to the certified LCP and public access policies of the Coastal Act. As described above, the Commission finds that the appellants’ contentions do raise substantial issues with regard to the consistency of the approved project with riparian woodland, monarch butterfly habitat, and environmentally sensitive habitat standards of the certified Local Coastal Program.

G. INFORMATION NEEDED FOR *DE NOVO* REVIEW OF APPLICATION

As stated above, Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed. Section 30621 of the Coastal Act instructs the Commission to provide for a *de novo* hearing on all appeals where it has determined that a substantial issue exists with respect to the grounds on which an appeal has been filed. In accordance with the staff recommendation, the Commission finds that the *de novo* portion of the appeal hearing must be continued because the Commission does not have sufficient information to determine how the proposed development could be modified so that it can be approved consistent with the certified LCP.

Given that the development that the Commission will be considering *de novo* has come to the Commission after an appeal of a local government action, the Commission has not previously been in the position to request information from the applicant needed to determine if the project can be found to be consistent with the certified LCP. Following is a discussion of the information needed to evaluate the development.

1. Biological Assessment

As discussed above, based on an initial review of historic photographs, it is apparent that portions of the Toro Canyon Creek riparian woodland and designated monarch butterfly habitat have been removed on the subject site. No permits have been issued for this removal and any such removal would not be eligible to receive a coastal development permit because it would be inconsistent with the provisions of the LCP that require protection of environmentally sensitive habitat.

Because the removal of the ESHA is a violation, setbacks and impacts must be evaluated from the extent of the previously existing ESHA. However, the biological assessment prepared for this project does not address the removal of riparian woodland and monarch butterfly habitat on the subject property, and therefore it is not adequate to make a determination as to the development's consistency with environmentally sensitive habitat, and riparian and monarch butterfly habitat requirements. To properly address the ESHA impacts associated with the approval of the after-the-fact development, the applicant must submit a biological evaluation that: (1) maps the woodland/eucalyptus canopy prior to any removal; (2) evaluates where and what species of vegetation has been removed; (3) illustrates setbacks from the previous canopies to the accessory structure in its proposed location; and (4) includes an ESHA delineation and assessment of adequate buffers from ESHA.

2. Pre-Coastal Structures

Evaluation as to whether the subject accessory structure was permitted in compliance with the laws in effect at the time the structures were constructed and/or placed on the property.

3. Lot Legality

Background information showing that the subdivision that reportedly occurred in 1981 received all required permits and approvals, including a coastal development permit.

Without the above information, the Commission cannot reach a final determination concerning the project's consistency with the environmentally sensitive habitat area, monarch butterfly, and riparian habitat policies of the LCP. Therefore, before the Commission can act on the proposed project *de novo*, the applicant must submit all of the above-identified information.