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Prepared July 22, 2009 (for August 12, 2009 hearing)

To: Coastal Commissioners and Interested Persons

From: Peter Douglas, Executive Director
Dan Carl, District Manager
Jonathan Bishop, Coastal Planner

Subject: Procedures 3-09-015-EDD (DeCicco Mixed Use Project). Commission determination of applicable coastal development permit application processing procedure (pursuant to California Code of Regulations, Title 14, Section 13569 and San Luis Obispo County Local Coastal Program Section 23.01.041g) for proposed DeCicco subdivision and mixed-use development in the Cayucos area of San Luis Obispo County (San Luis Obispo County application number SUB2005-00241/DRC2006-00064).

Summary

After Local Coastal Program (LCP) certification, the Coastal Commission is responsible for resolving disagreements between the certified local governments and the Commission's Executive Director regarding the noticing and hearing requirements applicable to coastal development proposals (i.e., whether they are categorically excluded from coastal development permit (CDP) requirements, non-appealable, or appealable), pursuant to Section 13569 of the Commission's Regulations (California Code of Regulations (CCR), Title 14). San Luis Obispo County's LCP contains a similar dispute resolution provision (LCP Section 23.01.041g).

In this case, San Luis Obispo County disagrees with the Executive Director's determination that the County's approval of a CDP for the proposed subdivision and mixed-use development (located at the northwest corner of Ocean Boulevard and Old Creek Road in the community of Cayucos in San Luis Obispo County) is appealable to the Commission. The County asserts that their action on a CDP for this proposed project is not appealable under LCP Coastal Zone Land Use Ordinance (CZLUO) Section 23.01.043c(4). This disagreement surfaced after the applicant submitted a CDP application that was accepted and approved by the County Board of Supervisors and subsequently noticed to the Coastal Commission as non-appealable development. The notice was returned to the County as deficient, citing among other things that the action taken was incorrectly identified and noticed as non-appealable. The County's determination was also challenged by an interested person, who asked to have a Commission determination as to the appropriate appeal designation. The County responded with a corrected notice, but again determined that their action on the proposed project is non-appealable. The County notified the Commission by phone of the dispute/question and requested the Executive Director's opinion. The Executive Director determined that the subdivision development is appealable and transmitted this determination to the County. The Executive Director's determination is not in accordance with the County's determination, giving rise to the disagreement currently before the Commission.

At the center of this disagreement is whether the proposed subdivision development is appealable.



Under the LCP, any approved development not listed in Table O of the LCP as a Principal Permitted (P) Use is appealable (Section 23.01.043c(4)). The County does not consider the subdivision itself to be a “use” under Table O of the LCP. According to the County, a subdivision is not defined as a “use” in the LCP, and there is nothing that automatically makes a subdivision appealable.

However, the Executive Director rejects the County’s assertion that the subject subdivision development is not appealable to the Commission. Section 30603(a)(4) of the Coastal Act confers appellate jurisdiction over “any development” approved by a coastal county that is not designated as the principal permitted use under a county’s approved zoning ordinance or zoning district map. A subdivision constitutes “development” under both Section 30106 of the Coastal Act and the certified LCP (CZLUO Section 23.11.030). The property associated with the approved subdivision development is within the Residential Multi-Family (RMF) and Commercial Retail (CR) land use categories. Subdivisions are not designated as a principal permitted use under the applicable land use categories of the LCP. Because the division of land constitutes “development” but is not identified as a principal permitted use within the RMF or CR land use category of the LCP, any approval of a coastal development permit for a subdivision in the RMF or CR land use category is appealable to the Coastal Commission. Therefore, the Executive Director’s determination continues to be that the County’s approval of a CDP for the proposed project is appealable to the Commission pursuant to Coastal Act Section 30603(a)(4) and LCP Section 23.01.043c(4).

The determination of appeal jurisdiction for subdivision development, and by extension the accurate and consistent application of CZLUO Section 23.01.043c(4), is of both regional and statewide importance. In order to ensure that the Commission’s appeal jurisdiction is consistently applied for subdivision development, **staff recommends that the Commission concur with the Executive Director’s determination that an appealable coastal development permit is required for the proposed project.** The motion to implement this recommendation is found on page 3 below.

Report Contents

1. Executive Director’s Recommendation	2
2. Findings and Declarations	3
3. Exhibits	
Exhibit A: Deficient FLAN notice (November 26, 2008)	
Exhibit B: County’s corrected FLAN (January 27, 2009)	
Exhibit C: Executive Director’s appealability determination (January 30, 2009)	
Exhibit D: John Belsher’s 13569 challenge of appealability determination (December 5, 2009)	

1. Executive Director’s Recommendation



The Executive Director has determined that San Luis Obispo County application number SUB2005-00241/DRC2006-00064 is appealable development as reflected in LCP Section 23.01.043c(4) because subdivision development is not listed in Coastal Table O of the LCP as principally permitted. If the Commission concurs, then notice of this Commission determination will be forwarded to San Luis Obispo County and the applicant.

Motion. I move that the Commission reject the Executive Director's determination that San Luis Obispo County's approval of a CDP on October 28, 2008 for the subject development is appealable to the Coastal Commission.

Executive Director's Recommendation. The Executive Director recommends a **NO** vote. Following the Executive Director's recommended "no" vote will cause the motion to fail, resulting in: (1) the Commission upholding the Executive Director's determination that San Luis Obispo County's approval of a coastal development permit for County application number SUB2005-00241/DRC2006-00064 on October 28, 2008 is appealable to the Coastal Commission; and (2) the adoption of the following resolution and findings. The affirmative vote of a majority of the Commissioners present is necessary to pass the motion.

Resolution. The Commission, by adoption of the attached findings, determines, consistent with Section 13569 of Title 14 of the California Code of Regulations, that the approval of a coastal development permit for San Luis Obispo County application number SUB2005-00241/DRC2006-00064 is appealable to the Coastal Commission.

2. Findings and Declarations

The Commission finds and declares as follows:

A. Dispute Background

San Luis Obispo County application number SUB2005-00241/DRC2006-00064 is an application by Frank DeCicco for a one-lot subdivision to create a residential/motel mixed-use development, all in a three-story building. The subdivision will create five condominium units, four of which will be used as residential multi-family units, and the fifth which will consist of an 18-unit motel. In addition, the development will include a 17,600 square-foot subterranean parking garage. The CDP application was approved by the County Planning Commission on June 26, 2008. The Planning Commission's approval was then appealed to the County Board of Supervisors, and the Board of Supervisors ultimately approved the CDP for the project on October 28, 2008.

Following the Board of Supervisor's approval, the County sent a Final Local Action Notice (FLAN) to the Coastal Commission indicating that the County had approved a non-appealable CDP for the subject development. In response, a deficient FLAN notice was sent by Commission staff to the County on



November 26, 2008, citing among other things that the action taken was incorrectly identified and noticed as non-appealable (see Exhibit A). Shortly thereafter, the County's appealability determination was also challenged by an interested person, John Belsher, who asked to have a Commission determination pursuant to CCR Section 13569 as to the appropriate appeal designation.¹ Subsequently, on January 27, 2009 the County responded with a corrected FLAN again indicating that action on the proposed project was non-appealable (see Exhibit B). The County also indicated in this corrected FLAN that it would be pursuing the Executive Director's opinion regarding the appealability question under CCR Section 13569. On January 30, 2009, the Executive Director responded to the County reiterating the guidance previously provided by Commission staff, indicating that the County's approval of a CDP for the subject development could be appealed to the Coastal Commission (see Exhibit C).² On February 27, 2009, the County, by phone, reiterated their position regarding appealability and in response, on March 3, 2009, the County was informed that because the Executive Director determined that the CDP was appealable and because the County and the Executive Director were not in agreement, the processing dispute would thus need to be resolved by the Commission at a hearing pursuant to CCR Section 13569 and LCP Section 23.01.041g (see Exhibit C). Because CCR Section 13569 indicates that the Commission must schedule the hearing in the appropriate geographic region of the state following the local government request, and because the next local Coastal Commission hearing relative to San Luis Obispo County and Cayucos was in July in San Luis Obispo, the dispute resolution hearing was scheduled for July. Subsequently, at the applicant and County's request, the hearing was postponed a month to the August Commission hearing.

B. Dispute Resolution Procedures

Both the Commission's regulations and the County's LCP provide a resolution mechanism for such disputes. CCR Section 13569 states:

***Section 13569 (Determination of Applicable Notice and Hearing Procedures).** The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program. Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:*

(a) The local government shall make its determination as to what type of development is being

¹ See correspondence dated December 5, 2009 in Exhibit D.

² This January 30, 2009 response was again based upon review of the materials forwarded by the County to the Commission.



proposed (i.e. categorically excluded, appealable, non-appealable) and shall inform the applicant of the notice and hearing requirements for that particular development. The local determination may be made by any designated local government employee(s) or any local body as provided in local government procedures.

- (b) If the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion;*
- (c) The executive director shall, within two (2) working days of the local government request (or upon completion of a site inspection where such inspection is warranted), transmit his or her determination as to whether the development is categorically excluded, non-appealable or appealable:*
- (d) Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request.*

Similarly, San Luis Obispo County LCP Section 23.01.041g states:

Determination of applicable notice and hearing procedures. *The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the county at the time the application for development within the Coastal Zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and provisions of this title which are adopted as part of the Local Coastal Program. Where an applicant, interested person or the county has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:*

- (1) The Planning Director shall make his/her determination as to what type of development is being proposed (i.e., categorically excluded, appealable, non-appealable) and shall inform the applicant of the notice and hearing requirements for that particular development.*
- (2) If the determination of the Planning Director is challenged by the applicant or an interested person, or if the county wishes to have a determination by the Coastal commission as to the appropriate designation, the Planning Director shall notify the Coastal Commission by telephone of the dispute/question and shall request an Executive Director's opinion.*



Thus, in a situation like this where the County and the Executive Director are not in agreement on the correct appealability determination for the proposed project, that dispute is resolved by the Coastal Commission.

C. Subdivisions Are “Development”

The definition of “development” explicitly includes subdivisions. Coastal Act Section 30106 and San Luis Obispo County CZLUO Section 23.11.030 in applicable part both define “development” as:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; ...[emphasis added]

Accordingly, pursuant to Section 30106 of the Coastal Act, and San Luis Obispo County CZLUO Section 23.11.030 as cited above, the County-approved subdivision is development, and therefore requires a CDP pursuant to Section 30600 of the Coastal Act, and Section 23.03.040 of the San Luis Obispo County CZLUO. In this case, because San Luis Obispo County has a certified LCP, the applicant pursued a CDP for the land division from San Luis Obispo County.

D. Appealability of Development Approved by a Coastal County

Under certain circumstances, CDPs approved by a coastal county are appealable to the Commission. Section 30603 of the Coastal Act provides the basis for appeal of locally approved CDPs to the Commission. That section provides, in part, that:

- (a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments: ...*
- (4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section 30500).*

Section 30603(a)(4) makes the approval of “any development” by a coastal county appealable to the Commission, with the only exception being development that is “designated as the principal permitted use” under the zoning in the LCP. Therefore, unless the approved development is specifically identified as one of the principal permitted uses in the County’s zoning, the Coastal Act gives the Commission



appellate jurisdiction to review it.

San Luis Obispo County CZLUO Section 23.01.043c(4) provides for the same provisions. That section provides appeal authority to the Coastal Commission for: ...

(4) Any approved development not listed in Coastal Table O, Part I of the Land Use Element as a Principal Permitted (P) Use.

San Luis Obispo County CZLUO Section 23.11.030 provides a definition of “Principal Permitted Use or Primary Permitted Use” as follows:

When used in this title or the Land Use Element, shall mean Principally Permitted Use, as identified by Coastal Table O, Part I of the Land Use Element

San Luis Obispo County Table O defines a “principally permitted use” as:

Principally permitted use, a use to be encouraged and that has priority over non-principally permitted uses, but not over agriculture or coastal dependent uses.

The property affected by the approved subdivision is designated Residential Multi Family (RMF) and Commercial Retail (CR) under the LCP. The County’s LCP fails to designate one principally permitted use for either land use category. Moreover, divisions of land are not designated as the principal permitted use under any land use category of Table O of the LCP. Because the division of land constitutes development but is not identified as the principal permitted use in the LCP, any approval of a coastal development permit for a division of land in the RMF or CR land use category is appealable to the Coastal Commission. Therefore, the Commission finds that the County’s approval of the land division is appealable to the Commission pursuant to Section 30603(a)(4) of the Coastal Act.

E. County Asserts that Approved Development is Not Appealable

The County asserts that subdivisions are not appealable because subdivisions are not considered “uses” of property under Table O of the LCP. The County’s response letter states in applicable part:

Finally, the County does not consider the subdivision itself to be a “use” under Table O. Subdivision is included in the definition of “development,” which is then subject to the criteria in 23.01.043. A subdivision is not defined as a use in the LCP and there is nothing in our regulations that automatically makes a subdivision appealable.

However, the County’s position ignores that Section 30603(a)(4) of the Coastal Act specifies that “*any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map*” is appealable to the Commission. By maintaining that a subdivision is not a “use,” the County rewords Section 30603(a)(4), which concerns whether a proposed activity involves “development,” such as divisions of land; in effect, the County’s argument reads the



word “development” out of this section of the Coastal Act. However, as detailed above, the approved subdivision constitutes “development.” An activity need not be a “use” to give rise to appellate review, so long as the activity constitutes “development.” Development that is designated as the principal permitted use constitutes an *exception* to the Commission’s appellate review. Thus, to the extent the County argues that a subdivision is not a “use,” the County could at most establish that a subdivision cannot be a principal permitted use, and therefore cannot qualify as an *exception* to the Commission’s appellate review authority.

In addition, there is some question as to whether the underground parking garage approved for the RMF portion of the site and the associated dewatering during construction are also development not considered principally permitted uses that would trigger the Commission’s appeal jurisdiction.³ Although this is an interesting assertion, separating out such portions of the project, including specific construction related elements (like excavation and dewatering), and extending the same rationale for appeal authority to each piece of the project as a whole, reaches too far in this case. Furthermore, it is clear that the development in question is appealable by virtue of the subdivision, and the Commission need not reach a conclusion on this additional assertion to make that finding.

Therefore, the Commission rejects the County’s contention that the approval of the subdivision development is not appealable to the Commission.

F. Review of Land Divisions in the Coastal Zone is an Issue of Statewide Significance

The Commission also finds that appellate review of land divisions for conformity with the policies of the County’s LCP and the Coastal Act is a matter of statewide significance and that the Commission’s administrative interpretation is consistent with both the language and purpose of Section 30603(a)(4) of the Coastal Act. Subdivision approvals require complex planning involving important considerations about the level of development and the availability of public services. It is reasonable that the Legislature would have wanted the Commission to review a county’s approval of a class of projects that may have potentially severe impacts. Likewise, subdivisions present issues that, unlike principal permitted uses, could not have been fully anticipated when the Commission certified the LCP, also supporting the need for Commission review. If the purpose of Coastal Act Section 30603(a)(4) was to give the Commission appellate jurisdiction over uses that are conditional (that is, uses that are not principally permitted), then it is reasonable that the Commission would have jurisdiction to review the approval of a subdivision because their approval is a discretionary decision akin to the approval of a conditional use. Moreover, subdivisions cause a change in the intensity or density of use, making their approval conceptually distinct from the approval of a principally permitted use that implements an expected use but does not change it. Finally, the Legislature’s ongoing concern with the creation of new subdivisions (see Gov. Code, §§ 66410, et seq. [Subdivision Map Act]) and its specific concern about

³ As raised by Mr. Belsher in his letter dated December 5, 2008; see Exhibit D.



the impacts of significant new development in coastal counties (which, unlike cities, are more likely to be rural or only partially developed) also demonstrate that the Legislature intended that the Commission would exercise appellate jurisdiction over county decisions involving land divisions.

Therefore, the Commission finds that appellate review of land divisions approved by a County for conformity with policies of the County's LCP and the Coastal Act is a matter of statewide significance and that the Commission's administrative interpretation is consistent with both the language and purpose of Section 30603(a)(4).

G. Conclusion

The Commission finds that Section 30603(a)(4) confers the Commission with appellate jurisdiction over any development that is not listed as the principal permitted use in the County's certified LCP. Therefore, the Commission finds that because the land division constitutes "development" under Coastal Act Section 30106 and CZLUO Section 23.11.030, and because subdivisions are not designated as the principal permitted use in the MFR and CR land use categories under Table O of the LCP, the County's approval of a CDP for land division is appealable to the Commission pursuant to Coastal Act Section 30603(a)(4) and CZLUO Section 23.01.043c(4).

