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**IMPORTANT NOTE:** The Commission will not take public testimony during this phase of the appeal hearing unless at least three commissioners request it. If the Commission finds that the appeal raises a substantial issue, it will schedule the de novo phase of the hearing for a future meeting, during which it will take public testimony. Written comments may be submitted to the Commission during either phase of the hearing.

Appeal filed: 8/4/2011  
49th day: 9/22/2011  
Staff report prepared: 8/18/2011  
Staff report prepared by: J. Bishop  
Staff report approved by: D. Carl  
Hearing date: 9/9/2011

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## APPEAL STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

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**Appeal number** .....A-3-SLO-11-055, Kellaway SFD

**Applicants** .....Tom Kellaway

**Appellant**.....Coastal Commissioners Brian Brennan and Mark Stone

**Local government** .....San Luis Obispo County

**Local decision** .....Coastal Development Permit (CDP) Application Number D99036P approved by San Luis Obispo County on July 1, 2011.

**Project location** .....Undeveloped 5-acre property accessed from Sea Horse Lane (approximately 1,000 feet south of Highland Drive) in the community of Los Osos near Morro Bay in San Luis Obispo County (APN 074-022-042).

**Project description**.....Construct a new two-story 11,412 square-foot single-family residence with attached 968 square foot garage (a total of approximately 12,400 square feet of residence/garage), driveway, and other site improvements.

**File documents**.....Final Local Action Notice for San Luis Obispo County CDP Number D990336P; San Luis Obispo County certified Local Coastal Program (LCP).

**Staff recommendation** ...**Substantial Issue Exists**

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### A. Staff Recommendation

#### 1. Summary of Staff Recommendation

San Luis Obispo County approved a CDP to construct a two-story 11,412 square-foot single-family residence with an attached 968 square-foot garage and driveway in the community of Los Osos, San Luis Obispo County. The approved project is located on a 5-acre undeveloped parcel that is made up of a habitat mosaic of coastal dune scrub, maritime chaparral, and oak woodland that supports and includes sensitive species habitat, including for the endangered Morro shoulderband snail and the threatened Morro manzanita. The entire property is an environmentally sensitive habitat area (ESHA) deemed terrestrial habitat (TH) ESHA by the certified San Luis Obispo County LCP.

The LCP requires the preservation and protection of TH ESHA, emphasizing protection of the entire



ecological community over individual plants and animals. Use and development in such areas is limited to only those that are dependent on the ESHA resource, and only where such use and development does not result in significant disruption to ESHA (including ESHA Policies 1, 2, 29, and 30). When application of this and related LCP policies will lead to a taking of private property, the LCP provides a process for allowing certain limited development as a means to avoid such a taking. In such extraordinary circumstances, only the least amount of development necessary to avoid such a taking is allowed, impacts must be avoided to the maximum extent feasible, and all adverse impacts to the ESHA must be fully mitigated (per LCP Coastal Zone Land Use Ordinance (CZLUO) Section 23.07.170).

The Appellants contend that the County's decision is inconsistent with the LCP's ESHA preservation and protection requirements. The County's CDP decision allows for approximately 14,200 square feet of residential structure and hardscape coverage, including a driveway from Sea Horse Lane, in an approved development envelope committed to residential purposes of approximately three-quarters of an acre. Per the LCP, such use and development is not allowed in ESHA, and is thus not approvable absent the need to avoid a taking. The County's action does not include discussion of a potential taking, and absent a conclusion that a taking would be engendered, the approved project is inconsistent with the LCP. Even if approval of development to avoid a taking is required per the LCP in this case, allowing such a large area of ESHA to be removed and defined as a residential development area does not appear to minimize development in ESHA, and is inconsistent with the LCP as well. In addition, it does not appear that the limited mitigation applied to the project sufficiently offsets the adverse impacts to ESHA from the County-approved project. Such impacts include direct removal and loss of ESHA from the development and the development envelope itself, as well as the indirect impacts to surrounding ESHA from the introduction of such use and development into the center of the all-ESHA site.

**The appeal raises a substantial LCP conformance issue related to core LCP ESHA resource preservation and protection requirements, and staff recommends that the Commission take jurisdiction over the CDP application for this project.** The motion and resolution to effect this recommendation are found directly below.

## 2. Staff Recommendation on Substantial Issue

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the project under the jurisdiction of the Commission for hearing and action.

**Motion.** I move that the Commission determine that Appeal Number A-3-SLO-11-055 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act. I recommend a no vote.

**Staff Recommendation of Substantial Issue.** 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 action 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 Number A-3-SLO-11-055 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.

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## B. Findings and Declarations

The Commission finds and declares as follows:

### 1. Project Location

The proposed project is located on the west side of Sea Horse Lane, approximately 1,000 feet south of Highland Drive, in the community of Los Osos near the “back bay” (i.e., downcoast) portion of Morro Bay in the Estero Planning Area of San Luis Obispo County. The proposed project is located on a 5-acre undeveloped parcel that is made up of a habitat mosaic of coastal dune scrub, maritime chaparral, and oak woodland that supports and includes sensitive species habitat, including for the endangered Morro shoulderband snail and the threatened Morro manzanita. The parcel, like many surrounding parcels, is larger in size (roughly 5 acres) and is in the LCP’s Residential Suburban (RS) land use category. Adjoining properties include single-family residences and horse riding/boarding facilities interspersed with undeveloped land.

See Exhibit A for location maps and photos of the project area.



## 2. Project Description

The County-approved project includes construction of a two-story 11,412 square-foot residence with an attached 968 square-foot garage (a total residence/garage structure of roughly 12,400 square feet), a driveway, and related residential development (i.e., septic system, patios, decks, retaining walls, landscaping, etc.). Structural and related hardscape coverage totals approximately 14,200 square feet, and the County approved a development envelope for that and other residential use and development totaling approximately three-quarters of an acre. The remaining area of the parcel outside of the development envelope (4.27 acres) would be placed partially in a conservation easement for shoulderband snail protection (3.82 acres) and partially in an open space easement (0.45 acres) for the purpose of planting of oaks and manzanitas onsite.

See Exhibit B for project site plans.

## 3. San Luis Obispo County CDP Approval

On July 1, 2011, San Luis Obispo County approved coastal development permit (CDP) application number D990336P. Notice of the County action on the CDP was received in the Coastal Commission's Central Coast District Office on July 21, 2011. The Coastal Commission's ten-working day appeal period for this action began on July 22, 2011 and concluded at 5 p.m. on August 4, 2011. One valid appeal was received during the appeal period (see Exhibit C).

## 4. Appeal Procedures

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

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b) of the Coastal Act requires the Commission to conduct a de novo CDP hearing on an appealed project unless a majority of the Commission finds that "no substantial issue" is raised by such allegations.<sup>1</sup> Under

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<sup>1</sup> The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. In previous decisions on appeals, the Commission has generally been guided by the following factors in making substantial issue determinations: the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the local



Section 30604(b), if the Commission conducts a de novo hearing and ultimately approves a CDP for a project, the Commission must find that the proposed development is in conformity with the certified LCP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission approves the project following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question are Applicants (or their representatives), persons (or their representatives) who made their views known before the local government, and representatives of the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the de novo CDP determination stage of an appeal.

## 5. Summary of Appeal Contentions

The Appellants contend that the County's CDP decision is inconsistent with certified LCP policies requiring preservation and protection of environmentally sensitive habitat area (ESHA) (including LCP ESHA Policies 1, 2, 29, and 30, and LCP Coastal Zone Land Use (CZLUO) Ordinance Sections 23.07.170 and 23.07.176).

Please see Exhibit C for the complete appeal document.

## 6. Substantial Issue Determination

### A. Applicable LCP Policies

LCP Section 23.11.030 defines ESHA as follows:

***Environmentally Sensitive Habitat Area (Mapped ESHA).*** A type of Sensitive Resource Area where 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 easily be disturbed or degraded by human activities and development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats and are mapped as Land Use Element combining designations. Is the same as an Environmentally Sensitive Habitat.

***Environmentally Sensitive Habitat Area (Unmapped ESHA).*** A type of Sensitive Resource Area where 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 easily be disturbed or degraded by human activities and development. They include, but are not limited to, known wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats that may not be mapped as

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government; the significance of the coastal resources affected by the decision; the precedential value of the local government's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.



*Land Use Element combining designations. The existence of Unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information. Unmapped ESHA includes but is not limited to:*

- a. Areas containing features or natural resources when identified by the County or County approved expert as having equivalent characteristics and natural function as mapped other environmental sensitive habitat areas;*
- b. Areas previously known to the County from environmental experts, documents or recognized studies as containing ESHA resources;*
- c. Other areas commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection.*

LCP ESHA land use policies applicable to ESHA include:

***ESHA Policy 1: Land Uses Within or Adjacent to Environmentally Sensitive Habitats.*** *New development within or adjacent to locations of environmentally sensitive habitats (within 100 feet unless sites further removed would significantly disrupt the habitat) shall not significantly disrupt the resource. Within an existing resource, only those uses dependent on such resources shall be allowed within the area. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTIONS 23.07.170-178 OF THE COASTAL ZONE LAND USE ORDINANCE (CZLUO)].*

***ESHA Policy 2: Permit Requirement.*** *As a condition of permit approval, the applicant is required to demonstrate that there will be no significant impact on sensitive habitats and that proposed development or activities will be consistent with the biological continuance of the habitat. This shall include an evaluation of the site prepared by a qualified professional which provides: a) the maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures where appropriate. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTIONS 23.07.170-178 OF THE CZLUO.]*

***ESHA Policy 29: Protection of Terrestrial Habitats.*** *Designated plant and wildlife habitats are environmentally sensitive habitat areas and emphasis for protection should be placed on the entire ecological community. Only uses dependent on the resource shall be permitted within the identified sensitive habitat portion of the site.*

*Development adjacent to environmentally sensitive habitat areas and holdings of the State Department of Parks and Recreation shall be sited and designed to prevent impacts that would significantly degrade such areas and shall be compatible with the continuance of such habitat areas. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.176 OF THE CZLUO.]*

***ESHA Policy 30: Protection of Native Vegetation.*** *Native trees and plant cover shall be protected wherever possible. Native plants shall be used where vegetation is removed. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.176 OF THE CZLUO.]*



In addition, CZLUO Section 23.07.170 provides a process for allowing certain limited development as a means to avoid a taking of private property, and CZLUO Section 23.07.176 emphasizes the protection on the entire ecological community over individual plants and/or animals. CZLUO Sections 21.07.170 and 23.07.176 state in relevant part:

**23.07.170 – Environmentally Sensitive Habitats:** *The provisions of this section apply to development proposed within or adjacent to (within 100 feet of the boundary of) an Environmentally Sensitive Habitat as defined by Chapter 23.11 of this title.*

**a. Application content.** *A land use permit application for a project on a site located within or adjacent to an Environmentally Sensitive Habitat shall also include a report by a biologist approved by the Environmental Coordinator that:*

- (1) Evaluates the impact the development may have on the habitat, and whether the development will be consistent with the biological continuance of the habitat. For those environmentally sensitive habitat areas which are only seasonally occupied, or where the presence of the species can best be determined during a certain season (e.g., an anadromous fish species or annual wildflower species), the field investigation(s) must be conducted during the appropriate time to maximize detection of the subject species. The report shall identify possible impacts, their significance, measures to avoid possible impacts, mitigation measures required to reduce impacts to less than significant levels when impacts cannot be avoided, measures for the restoration of damaged habitats and long-term protection of the habitats, and a program for monitoring and evaluating the effectiveness of such measures.*
- (2) Is complete, current, and meets established standards for report content and assessment methodology. Report standards shall be consistent with CEQA guidelines, and incorporate the recommendations of the California Coastal Commission, California Department of Fish and Game, U.S. Fish and Wildlife Service, Marine Mammals Commission, and National Marine Fisheries Service, as appropriate.*
- (3) Evaluates development proposed adjacent to environmentally sensitive habitats to identify significant negative impacts from noise, sediment and other potential disturbances that may become evident during project review.*
- (4) Identifies the biological constraints that need to be addressed in designing development that would first avoid, then minimize impacts to ESHA. These identified constraints will be used by the County to evaluate, and require implementation of project design alternatives that result in impacts to ESHA being avoided and unavoidable impacts minimized. This shall also include assessment of impacts that may result from the application of fire safety requirements*
- (5) Verifies that applicable setbacks from the habitat area required by Sections 23.07.170 to 23.07.178 are adequate to protect the habitat or recommends greater, more appropriate setbacks.*



*(6) Critically evaluate “after-the-fact” permit applications where un-permitted development has illegally encroached into setback areas before off-site mitigation is considered. Evaluate all options of restoring and enhancing the pre-existing on-site habitat values. Off-site mitigation consisting of replacing the area of disturbance with like habitat at a minimum of 3:1 ratio shall be an additional requirement to offset the temporary impacts of the violation and address the potential for restoration efforts to fail.*

*b. **Required findings:** Approval of a land use permit for a project within or adjacent to an Environmentally Sensitive Habitat shall not occur unless the applicable review body first finds that:*

*(1) There will be no significant negative impact on the identified sensitive habitat and the proposed use will be consistent with the biological continuance of the habitat.*

*(2) The proposed use will not significantly disrupt the habitat.*

*c. **Land divisions:** No division of a parcel containing an Environmentally Sensitive Habitat shall be permitted unless all proposed building sites are located entirely outside of the applicable minimum setback required by Sections 23.07.172 through 23.07.178. Such building sites shall be designated on the recorded subdivision map.*

*d. **Alternatives analysis required.** Construction of new, improved, or expanded roads, bridges and other crossings will only be allowed within required setbacks after an alternatives analysis has been completed. The alternatives analysis shall examine at least two other feasible locations with the goal of locating the least environmentally damaging alternative. When the alternatives analysis concludes that a feasible and less environmentally damaging alternative does not exist, the bridge or road may be allowed in the proposed location when accompanied by all feasible mitigation measures to avoid and/or minimize adverse environmental effects. If however, the alternatives analysis concludes that a feasible and less environmentally damaging alternative does exist, that alternative shall be used and any existing bridge or road within the setback shall be removed and the total area of disturbance restored to natural topography and vegetation.*

*e. **Development standards for environmentally sensitive habitats.** All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. This standard requires that any project which has the potential to cause significant adverse impacts to an ESHA be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.*

*(1) **Development within an ESHA.** In those cases where development within the ESHA cannot be avoided, the development shall be modified as necessary so that it is the least environmentally damaging feasible alternative. Development shall be consistent with the biological continuance of the habitat. Circumstances in which a development project would be allowable within an ESHA include:*





- i. **Resource dependent uses.** New development within the habitat shall be limited to those uses that are dependent upon the resource.*
  - ii. **Coastal accessways.** Public access easements and interpretive facilities such as nature trails which will improve public understanding of and support for protection of the resource.*
  - iii. **Incidental public services and utilities in wetlands.** Essential incidental public services and utilities pursuant to ESHA Policy 13 and CZLUO Section 23.07.172(e).*
  - iv. **Habitat creation and enhancement.** Where the project results in an unavoidable loss (i.e., temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant. Plans for the creation of new habitat, or the enhancement of existing habitat, shall consider the recommendations of the California Coastal Commission, the California Department of Fish and Game and/or U.S. Fish and Wildlife Service. Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ("same-kind") and within the same biome ("same-system"), and shall be permanently protected by a deed restriction or conservation easement.*
  - v. **Restoration of damaged habitats.** Restoration or management measure required to protect the resource. Projects located within or adjacent to environmentally sensitive habitat areas that have been damaged shall be conditioned to require the restoration, monitoring, and long-term protection of such habitat areas through a restoration plan and a accompanying deed restriction or conservation easement. Where previously disturbed but restorable habitat for rare and sensitive plant and animal species exists on a site that is surrounded by other environmentally sensitive habitat areas, these areas shall be delineated and considered for restoration as recommended by a restoration plan.*
- (2) Development in ESHA to avoid a takings.** *If development in an ESHA must be allowed to avoid an unconstitutional taking, then all of the following standards shall apply with respect to such development:*
- i. **Avoidance of takings.** The amount and type of development allowed shall be the least necessary to avoid a takings.*
  - ii. **Impacts avoided/minimized.** All development in and impacts to ESHA shall be avoided to the maximum extent feasible. Any unavoidable impacts shall be limited to the maximum extent feasible.*
  - iii. **Mitigation required.** All adverse impacts to the ESHA shall be fully mitigated.*



...

(5) *Grading adjacent to Environmentally Sensitive Habitats shall conform to the provisions of Section 23.05.034c (Grading Standards).*

(6) *The use of invasive plant species is prohibited.*

**23.07.176 – Terrestrial Habitat Protection:** *The provisions of this section are intended to preserve and protect rare and endangered species of terrestrial plants and animals by preserving their habitats. Emphasis for protection is on the entire ecological community rather than only the identified plant or animal.*

**a. Protection of vegetation.** *Vegetation that is rare or endangered, or that serves as habitat for rare or endangered species shall be protected. Development shall be sited to minimize disruption of habitat.*

**b. Terrestrial habitat development standards:**

(1) **Revegetation.** *Native plants shall be used where vegetation is removed.*

(2) **Area of disturbance.** *The area to be disturbed by development shall be shown on a site plan. The area in which grading is to occur shall be defined on site by readily-identifiable barriers that will protect the surrounding native habitat areas.*

(3) **Trails.** *Any pedestrian or equestrian trails through the habitat shall be shown on the site plan and marked on the site. The biologist's evaluation required by Section 23.07.170a shall also include a review of impacts on the habitat that may be associated with trails.*

## B. Analysis

The Appellants contend that the County approved project is inconsistent with the LCP's ESHA protection policies and ordinances, including with respect to the criteria of CZLUO Section 23.07.170(e)(2) dealing specifically with development in ESHA to avoid a takings.

The County-approved project is located on a 5-acre undeveloped parcel that is made up of a habitat mosaic of coastal dune scrub, maritime chaparral, and oak woodland that supports and includes sensitive species habitat, including for the endangered Morro shoulderband snail and the threatened Morro manzanita. Because of this, per the LCP's ESHA definition and related parameters, the entire property is ESHA deemed terrestrial habitat (TH) ESHA, and the County rightly came to this conclusion in their review.<sup>2</sup>

The LCP requires the preservation and protection of TH ESHA, and emphasizes protection of the entire ecological community over individual plants and/or animals (CZLUO Section 23.07.176). When TH

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<sup>2</sup> More evidence that the site is ESHA is that the project also requires issuance of an incidental take permit pursuant to the Endangered Species Act from the U.S. Fish and Wildlife Service.



ESHA is determined, as the County did in this case, use and development in such areas is limited to only that associated with those uses that are dependent on the ESHA resource, and only where such use and development does not result in significant disruption to ESHA (per ESHA Policies 1, 2, 29, and 30). When application of this and related LCP policies will lead to a taking of private property, the LCP provides a process for allowing certain limited development as a means to avoid such a taking. In such extraordinary circumstances, only the least amount of development necessary to avoid such a taking, including in terms of avoiding impacts to the maximum extent feasible, is allowed, and all adverse impacts to the ESHA must be fully mitigated (per CZLUO Section 23.07.170).

In this case, the County-approved project allows for approximately 12,400 square feet of residential structures (house and attached garage), and a total coverage area of approximately 14,200 square feet for such structures and associated hardscape (including the house, garage, patios, and driveway from Sea Horse Lane), in an approved development envelope totaling approximately three-quarters of an acre. Impacts from the proposed project include direct removal impacts to ESHA from the development (14,200 square feet) and the development envelope itself (three-quarters of an acre), as well as the indirect impacts to surrounding ESHA from the introduction of such use and development into the center of the all-ESHA site.

Per the LCP, such use and development is not resource dependent and not one of the allowed uses in ESHA, and is thus not approvable absent the need to avoid a taking. There is neither evidence nor discussion in the County's action notice indicating that a taking issue is raised. Absent such analysis and conclusion, the approved project is categorically inconsistent with the LCP on this point.

Even if approval of development to avoid a taking is required per the LCP in this case, not only is the information and discussion regarding such taking missing from the County's action, but it would appear that allowing such a large area of ESHA to be removed and defined as a development area is inconsistent with the LCP as well. The County did not evaluate the taking question, and did not evaluate other types, locations, and sizes of development that would be appropriate under a taking scenario, and there is no analysis of what measures could be taken to avoid impacts in a taking scenario, if one is present in this case (e.g., reducing the size of the allowed disturbance area, locating development on the least sensitive portions of the site, locating development in close proximity to other development nearby (i.e., clustering) rather than in the center of the property, shortening the driveway approach, etc.). A cursory review of surrounding properties and developments show that this project would be the largest in the area in terms of size and square footage of the residence, and could be one of the largest houses in the entire community of Los Osos. An approximately 32,000 square foot development envelope and an approximately 12,400 square-foot house/garage are large areas of residential disturbance and development generally, and appear even more excessive under the LCP for an all-ESHA site such as this.

In short, such development does not appear to be the least amount necessary to avoid a taking (if one is indeed present), and does not appear to avoid ESHA impacts to the maximum extent feasible, as required by the LCP. As described, a comprehensive alternatives analysis that focuses on appropriate types of uses for an all-EHSA site, as well as alternative design measures that could be used in a residential project to avoid ESHA impacts, is missing from the County approval. And although the



County's approval requires the remainder of the site to be preserved through easements (3.82 acres of conservation easement for Morro shoulderband snail and 0.45 acres of open space easement for oak and Manzanita plantings), the offsetting mitigation applied (i.e., enhancement of about one-quarter acre of coastal dune scrub onsite, four years of monitoring and maintenance of such enhancement area, and replanting of oaks and manzanitas at 4 and 5 to 1 ratios respectively to facilitate residential development) is less than a 1:1 area ratio in relation to the three-quarter acre development envelope, does not create new offsetting ESHA area, and overall does not sufficiently and proportionately offset the adverse impacts to ESHA from the County-approved project.

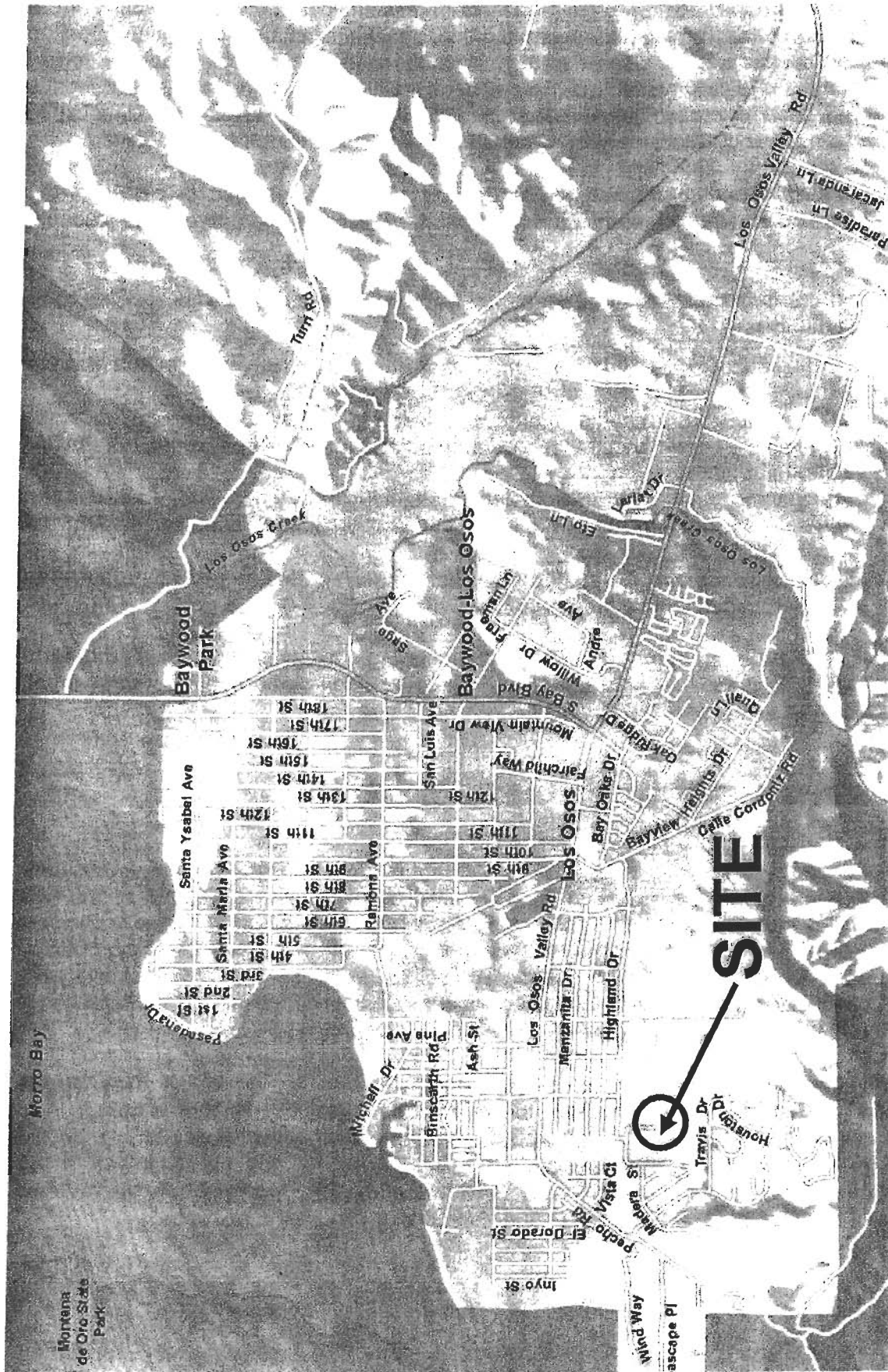
#### C. Substantial Issue Determination Conclusion

The County-approved project raises substantial LCP conformance issues because the project is located within ESHA, the approved residential use and development is not resource dependent, and therefore approval is categorically inconsistent with the LCP. Even if approval of some amount of development to avoid a taking is required under the LCP in this case, allowing such a large area of ESHA to be removed/lost and defined as a residential development area is excessive under the LCP for an all-ESHA site. The project is also inconsistent with the LCP's ESHA protection policies and ordinances because the development is not the least amount necessary to avoid a taking (if one in fact exists from applying the LCP) and does not avoid ESHA impacts to the maximum extent feasible. Mitigation required by the County does not sufficiently offset the adverse impacts to ESHA from the County-approved project.

In short, the County's action provides for a large scale residential project in a significant ESHA area that includes sensitive species habitat without adequate factual and legal support to justify approval of the project under the LCP. In addition, the action taken is the first in this area to be taken by the County in this time since the LCP was amended in 2008 to include explicit taking requirements with respect to development proposed in ESHA, and the County's action has the potential to prejudice future action and interpretation under the LCP in this area as well as San Luis Obispo County as a whole when presented with similar fact sets in the future. ESHA, including ESHA such as in this case that provides for endangered species habitat, is in finite supply, and actions taken under LCPs that result in a loss of ESHA and impacts to remaining ESHA are critical, and demand thoughtful and stepwise evaluation to be sure that such ESHA impacts in any particular case are appropriate. In this case, the County-approved project raises a substantial LCP conformance issue on these points as described above, and the Commission takes jurisdiction over the CDP application for the proposed project.

Prior to bringing this matter back for Coastal Commission review in a de novo CDP hearing context, the Applicant will need to provide information related to a potential taking, including with respect to the economic impact of applying the LCP's ESHA policies at this site to this project and the nature of the Applicant's property interest in a takings context. In addition, the Applicant must provide an alternatives analysis assessing whether there are alternative project projects and/or project designs that would avoid ESHA impacts to the maximum extent feasible. Absent such information and a determination that application of the LCP's ESHA policies will result in a taking, the proposed project is inconsistent with the LCP's ESHA policies, as described above.

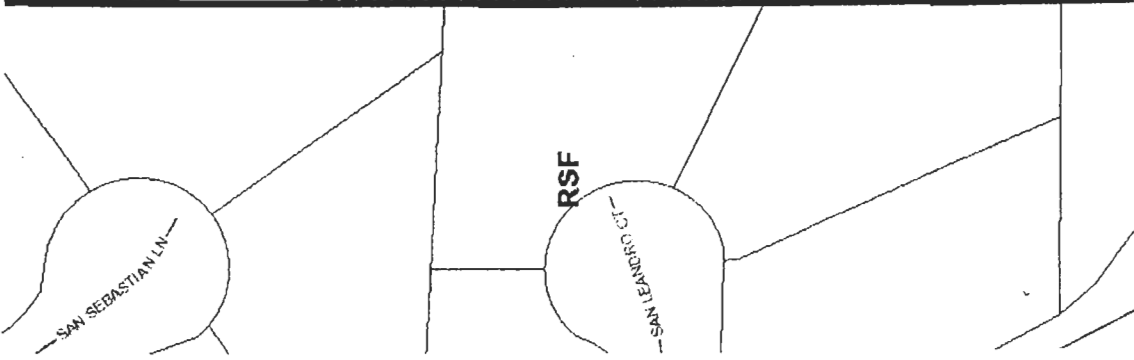




PROJECT  
Minor Use Permit  
D990336P / Kellaway



EXHIBIT  
Vicinity Map



RS

# SITE

SEA HORSE LN

PRIVATE

PROJECT  
Minor Use Permit  
D990336P / Kellaway



EXHIBIT  
Land Use Map



SITE

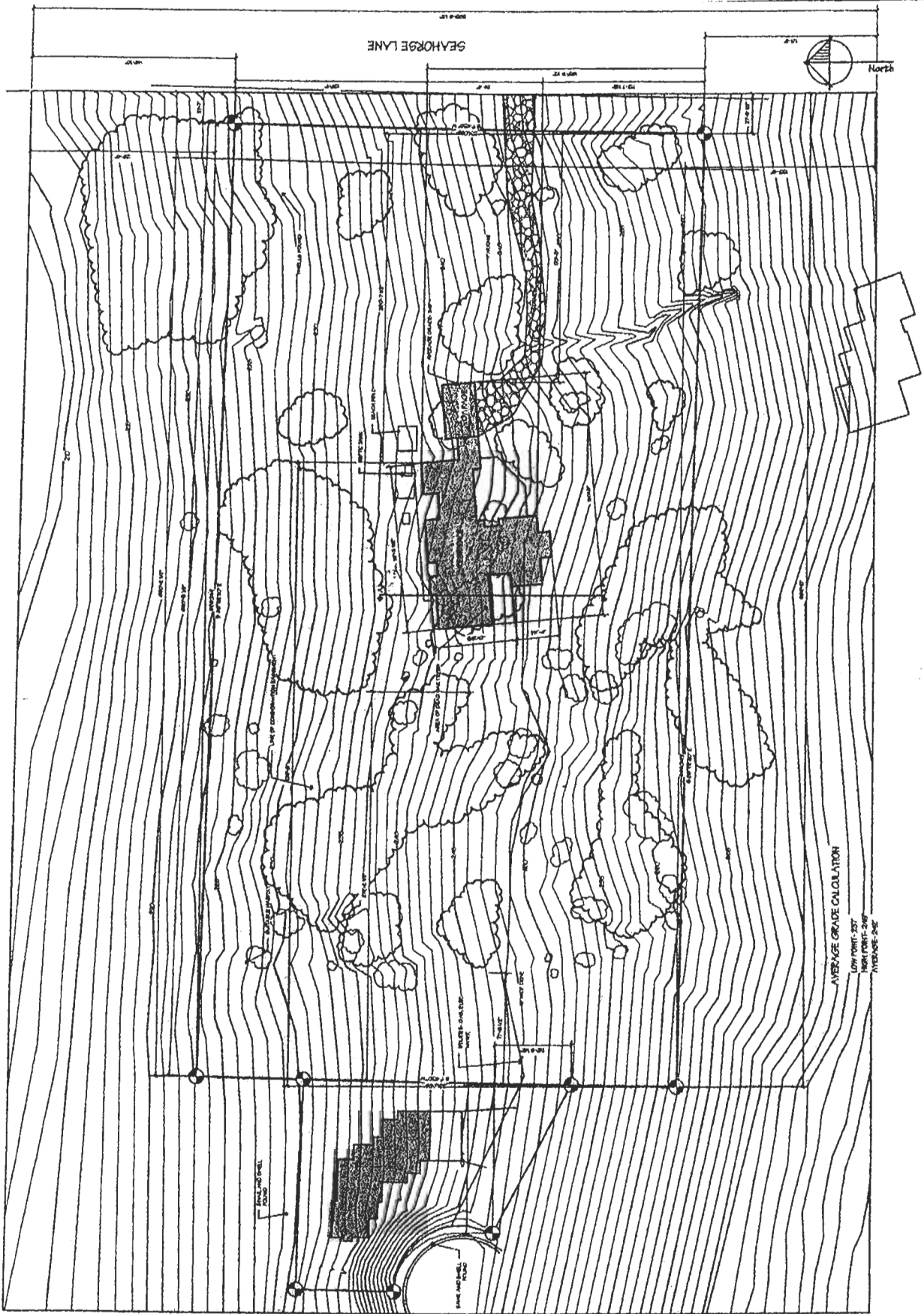
EXHIBIT

Aerial



PROJECT  
Minor Use Permit  
D990336P / Kellaway





EXHIBIT

Site Plan



PROJECT

Minor Use Permit  
D990336P / Kellaway



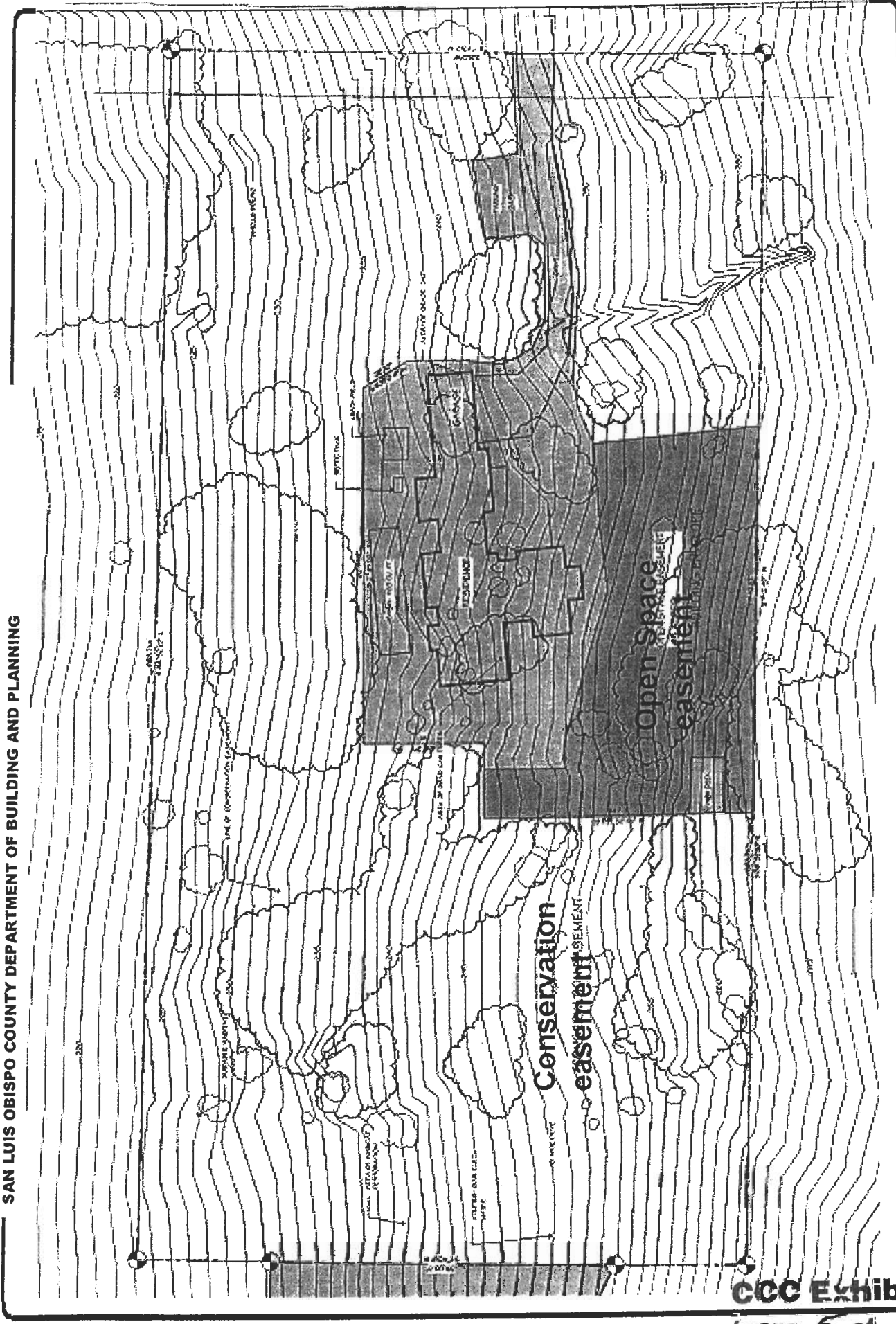
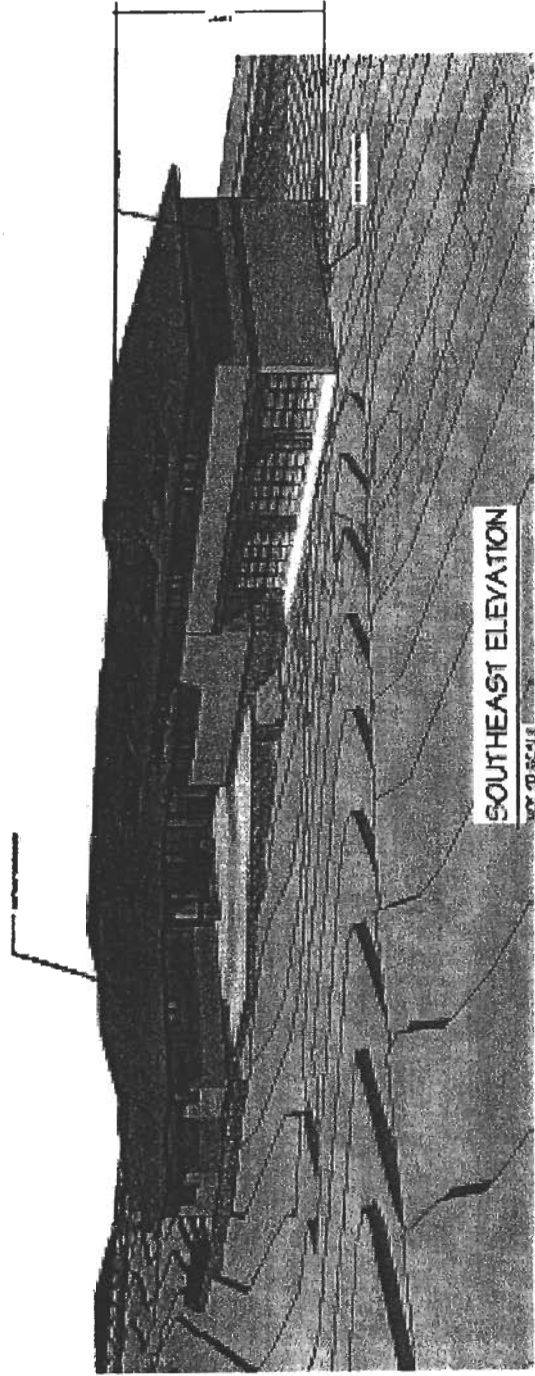
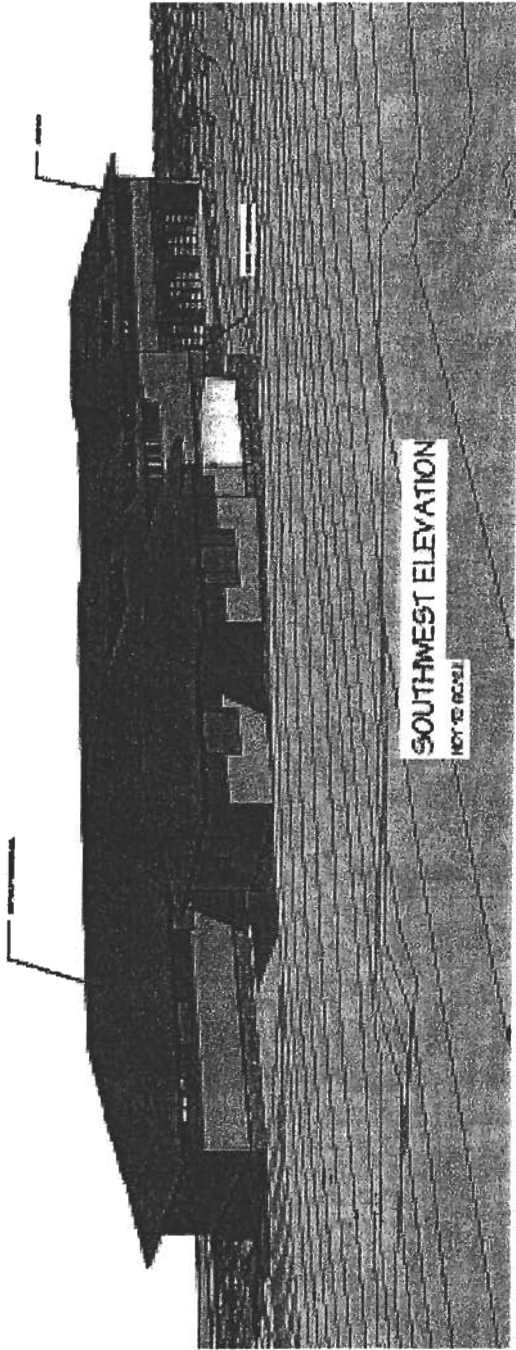


EXHIBIT  
Conserved areas



PROJECT  
Minor Use Permit  
D990336P / Kellaway



PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

Elevations





SAN LUIS OBISPO COUNTY  
DEPARTMENT OF PLANNING AND BUILDING

FINAL LOCAL  
ACTION NOTICE  
REFERENCE # 3-SLO-11-145  
APPEAL PERIOD 7/22 - 8/4/11

July 5, 2011

Tom Kellaway  
P.O. Box 480500  
Kansas City, MO 64148

Robert Semonsen  
1120 4<sup>th</sup> Street  
Los Osos, CA 93402

RECEIVED

JUL 21 2011

California Coastal Commission,  
Central Coast Area

NOTICE OF FINAL COUNTY ACTION

HEARING DATE: July 1, 2011

SUBJECT: TOM KELLAWAY  
County File Number: D990336P  
Minor Use Permit / Coastal Development Permit  
DOCUMENT NUMBER: 2011-047\_PDH

LOCATED WITHIN COASTAL ZONE: YES

The above-referenced application was approved by the Hearing Officer, based on the approved Findings and Conditions, which are attached for your records. This Notice of Final Action is being mailed to you pursuant to Section 23.02.033(d) of the Land Use Ordinance.

This action is appealable to the Board of Supervisors within 14 days of this action. If there are Coastal grounds for the appeal there will be no fee. If an appeal is filed with non-coastal issues there is a fee of \$850.00. This action may also be appealable to the California Coastal Commission pursuant to regulations contained in Coastal Act Section 30603 and the County Coastal Zone Land Use Ordinance 23.01.043. These regulations contain specific time limits to appeal, criteria, and procedures that must be followed to appeal this action. The regulations provide the California Coastal Commission 10 working days following the expiration of the County appeal period to appeal the decision. This means that no construction permits can be issued until both the County appeal period and the additional Coastal Commission appeal period have expired without an appeal being filed.

Exhaustion of appeals at the county level is required prior to appealing the matter to the California Coastal Commission. This second appeal must be made directly to the California

CCC Exhibit B  
(page 1 of 14 pages)

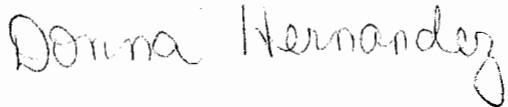
Coastal Commission Office. Contact the Commission's Santa Cruz Office at (831) 427-4863 for further information on their appeal procedures.

If the use authorized by this Permit approval has not been established or if substantial work on the property towards the establishment of the use is not in progress after a period of twenty-four (24) months from the date of this approval or such other time period as may be designated through conditions of approval of this Permit, this approval shall expire and become void unless an extension of time has been granted pursuant to the provisions of Section 23.02.050 of the Land Use Ordinance.

If the use authorized by this Permit approval, once established, is or has been unused, abandoned, discontinued, or has ceased for a period of six (6) months or conditions have not been complied with, such Permit approval shall become void.

If you have questions regarding your project, please contact your planner at (805) 781-5600. If you have any questions regarding these procedures, please contact me at (805) 788-2947.

Sincerely,



DONNA HERNANDEZ, SECRETARY PRO TEM  
PLANNING DEPARTMENT HEARINGS

## EXHIBIT A - FINDINGS

### *Environmental Determination*

- A. The Environmental Coordinator, after completion of the initial study, finds that there is no substantial evidence that the project may have a significant effect on the environment, and the preparation of an Environmental Impact Report is not necessary. Therefore, a Negative Declaration (pursuant to Public Resources Code Section 21000 et seq. and CA Code of Regulations Section 15000 et seq.) has been issued on May 26, 2011 for this project. Mitigation measures are proposed to address aesthetics, biological resources, air quality, geology /soils, public services, transportation/ circulation, water resources and are included as conditions of approval.

### *Minor Use Permit*

- B. The proposed project or use is consistent with the San Luis Obispo County General Plan because all future uses as conditioned will be consistent with all of the General Plan policies.
- C. As conditioned, the proposed project satisfies all applicable provisions of Title 23 of the County Code.
- D. The establishment and subsequent operation or conduct of the use will not, because of the circumstances and conditions applied in the particular case, be detrimental to the health, safety or welfare of the general public or persons residing or working in the neighborhood of the use, or be detrimental or injurious to property or improvements in the vicinity of the use because the project does not generate activity that presents a potential threat to the surrounding property and buildings. This project is subject to Ordinance and Building Code requirements designed to address health, safety and welfare concerns.
- E. The proposed project or use will not be inconsistent with the character of the immediate neighborhood or contrary to its orderly development because the project is similar to, and will not conflict with, the surrounding lands and uses.
- F. The proposed project or use will not generate a volume of traffic beyond the safe capacity of all roads providing access to the project, either existing or to be improved with the project because the project is located on Seahorse Lane, a local road constructed to a level able to handle any additional traffic associated with the project.

### *Coastal Access*

- G. The project site is located between the first public road and the ocean. The project site is within an urban reserve line (Los Osos) and an existing coastal access point exists within ¼ mile of the project site, therefore, the proposed use is in conformity with the public access and recreation policies of Chapter 3 of the California Coastal Act.

### *Water Resources*

- H. The capacities of available water supply and sewage disposal services are sufficient to accommodate both existing development, and allowed development on presently-vacant parcels within the urban services line because the applicant is required to retrofit existing development to result in a savings of 900 gallons of water per day. This will off-set the projects demand for water at a 2:1 ratio.

## EXHIBIT B - CONDITIONS OF APPROVAL

### Approved Development

1. This approval authorizes a two story 11,412 square-foot single family residence with attached 968 square-foot garage.

### Conditions required to be completed at the time of application for construction permits

#### **Site Development**

2. Plans submitted shall show all development consistent with the approved site plan, floor plan, and architectural elevations.
3. The applicant shall submit landscape, irrigation, landscape maintenance plans and specifications to the Environmental Coordinator. The landscape plan shall be prepared as provided in Section 23.04.186 of the San Luis Obispo County Coastal Zone Land Use Ordinance. All plants utilized shall be drought tolerant. Drip-line irrigation shall be used for all landscaped areas (except turf areas) installed for new construction. The drip irrigation system must include an automatic rain shut-off device, soil moisture sensors, and an operating manual to instruct the building occupant on how to use and maintain the water conservation hardware. The maximum amount of turf (lawn) area may not exceed 400 square feet.
4. The applicant shall provide details on any proposed exterior lighting, if applicable. The details shall include the height, location, and intensity of all exterior lighting. All lighting fixtures shall be shielded so that neither the lamp or the related reflector interior surface is visible from adjacent properties. Light hoods shall be dark colored. Plans shall note that night lighting of the residence and access to the development shall be limited to minimal, downward-facing fixtures, sufficient only to provide safe access, and screened to not be seen off-site.
5. **At the time of application for construction permits**, the applicant shall clearly delineate on the project plans the visual treatment of all proposed structures. Visual treatment shall include colors and materials. Colors shall minimize the structure massing of new development by reducing the contrast between the proposed development and the surrounding environment. Colors shall be compatible with the natural colors of the surrounding environment, including vegetation, rock outcrops, etc. Non-reflective, muted colors shall be selected for walls, chimneys etc. and darker green, grey, slate blue, or brown colors for the roof structures.

#### **Fire Safety**

6. **At the time of application for construction permits**, all plans submitted to the Department of Planning and Building shall meet the fire and life safety requirements of the California Fire Code. Provide the County Department of Planning and Building with a fire safety plan approved by CalFire.

#### **Services**

7. The applicant shall provide a letter from Golden State Water Company stating they are willing and able to service (water) the property.
8. The applicant shall submit evidence that a septic system, adequate to serve the proposal, can be installed on the site.

**Public Works**

9. The applicant shall meet of all the requirements of the Department of Public Works.

**Conditions to be completed prior to issuance of a construction permit**

**Fees**

10. **Prior to issuance of a construction permit**, the applicant shall pay all applicable school and public facilities fees.

**Air Quality**

11. **Prior to issuance of construction permits**, the applicant shall demonstrate that the energy demand of the proposed residence , to the maximum extent feasible and to the satisfaction of the Department of Planning and Building, shall not exceed that of a 5,500 square foot residence (reduction of approximately 50% of Title 24 energy requirements).

**Biological Resources**

12. Prior to the commencement of any vegetation clearing or ground-disturbing activities, the applicant demonstrate they are in possession of a valid section 10(a)(1)(B) incidental take permit for Morro shoulderband snail on the subject parcel and commit to compliance with all of the conditions contained therein.
13. Pre-construction and construction monitoring surveys for Morro shoulderband snail will be conducted within the impact area and submitted to the County of San Luis Obispo.
14. All identified individuals of Morro shoulderband snail will be relocated, by an individual in possession of a current valid recovery permit for the species into the conservation easement area, out of harm's way.
15. **Prior to site disturbance**, a continuous silt fence will be installed to establish the limits of the construction area. The fence will delineate the work zone and establish the limits of the construction area. The fence will remain in place throughout the duration of the project.
16. **Prior to site disturbance**, the applicant shall demonstrate that the development and presentation of a contractor and employee training program for Morro shoulderband snail has been completed.
17. **Prior to issuance of construction permits**, preservation in perpetuity of 4.27 acres of coastal dune scrub and maritime chaparral habitats occupied by Morro shoulderband snail in a easement in a form acceptable to the US Fish and Wildlife Service and County Counsel (and may be a combination of easements) that will preclude any use not consistent with resource management.

**Geology and Soils**

18. **Prior to issuance of grading and construction permits**, at least two Low Impact Development design features shall be incorporated into the project design to reduce impacts associated with increased impervious areas on the site.



**Water Resources**

19. **Prior issuance of building permits**, the applicant shall submit to the Department of Planning and Building for review and approval evidence to the satisfaction of the Planning Director that the applicant has retrofitted enough existing homes and businesses to save twice the amount of water the new residence will use or 900 gallons per day (consistent with Title 19).

**Drainage**

20. Submit complete drainage calculations to the Department of Public Works for review and approval. Drainage must be detained in a drainage basin on the property. The design of the basin is to be approved by the Department of Public Works, in accordance with county standards.
21. The project shall comply with the requirements of the National Pollutant Discharge Elimination System Phase I and/or Phase II storm water program and the County's Storm Water Pollution Control and Discharge Ordinance.

**Conditions to be completed prior to occupancy or final building inspection / establishment of the use**

**Site Development**

22. Landscaping in accordance with the approved landscaping plan shall be installed or bonded for before **final building inspection / establishment of the use**. If bonded for, landscaping shall be installed within 60 days after final building inspection. All landscaping shall be maintained in a viable condition in perpetuity.

**Fire Safety**

23. **Prior to occupancy or final inspection**, whichever occurs first, the applicant shall obtain final inspection and approval from CalFire of all required fire/life safety measures.

**Development Review Inspection**

24. **Prior to occupancy of any structure associated with this approval**, the applicant shall contact the Department of Planning and Building to have the site inspected for compliance with the conditions of this approval.

**Aesthetics**

25. **Prior to final inspection or occupancy**, whichever occurs first, the applicant shall provide verification to the satisfaction of the county that these measures have been met. These conditions shall be maintained for the life of the project.
26. **Prior to final inspection or occupancy**, whichever occurs first, all exterior lighting shall comply with the lighting condition above. This condition shall be maintained for the life of the project.

**Biological Resources**

27. **Prior to final building inspection**, the applicant shall complete the enhancement of 0.24 acre of disturbed coastal dune scrub within the conservation easement to increase its value and function for Morro shoulderband snail.
28. **Prior to final building inspection**, the applicant shall submit a letter of credit to the US Fish and Wildlife Service for post-construction monitoring and maintenance of the habitat enhancement activities within the easement areas for a period of four years to



ensure its success. A Letter of Credit (with the US fish and Wildlife Service) in the amount of \$16,740 will be established to ensure that adequate funding is available to implement all of the minimization and mitigation measures contained in the plan.

29. **Prior final building inspection**, the applicant shall replace at a 4:1 ratio all oak trees removed as a result of the development of the project and at a 5:1 ratio all Morro Manzanita plants. No more than 1 oak tree having a five inch diameter or larger at four feet from the ground and 11 Morro Manzanita plants shall be removed as a result of the development of the project (as shown on the attached exhibit). Replanting shall be completed as soon as it is feasible (e.g. irrigation water is available, grading done in replant area). Replant areas shall be either in native topsoil or areas where native topsoil has been reapplied. If the latter, topsoil shall be carefully removed and stockpiled for spreading over graded areas to be replanted (set aside enough for 6-12" layer).
30. **Prior to final building inspection**, landscaping shall be installed or bonded for to ensure the implementation of the landscaping consistent with the approved landscaping plan.
31. **Prior to final inspection or occupancy**, the following measures shall be applied to the proposed turf areas:
  - a. To maximize drought-tolerance and minimize water usage, warm season grasses (excludes bermuda grass) such as buffalo grass, shall be used;
  - b. A computerized irrigation controller shall be installed that can estimate cumulative evapo-transpiration losses to establish the most efficient and effective watering regimes;
  - c. To minimize establishment of shallow roots, the following shall be avoided on turf areas: close mowing, overwatering, excessive fertilization, soil compaction and accumulation of thatch; and
  - d. Watering times shall be programmed for longer and less frequently rather than for short periods and more frequently.
32. **Prior to final building inspection**, one of the following shall be installed as a part of the water supply system: 1) A "Point-of-use" supplemental water heater system in all bathrooms and kitchen, or 2) a circulating hot water system.

**On-going conditions of approval (valid for the life of the project)**

***Miscellaneous***

33. This land use permit is valid for a period of 24 months from its effective date unless time extensions are granted pursuant to Land Use Ordinance Section 23.02.050 or the land use permit is considered vested. This land use permit is considered to be vested once a construction permit has been issued and substantial site work has been completed. Substantial site work is defined by Land Use Ordinance Section 23.02.042 as site work progressed beyond grading and completion of structural foundations; and construction is occurring above grade.
34. All conditions of this approval shall be strictly adhered to, within the time frames specified, and in an on-going manner for the life of the project. Failure to comply with these conditions of approval may result in an immediate enforcement action by the Department of Planning and Building. If it is determined that violation(s) of these

conditions of approval have occurred, or are occurring, this approval may be revoked pursuant to Section 23.10.160 of the Land Use Ordinance.



**COUNTY OF SAN LUIS OBISPO  
DEPARTMENT OF PLANNING AND BUILDING  
STAFF REPORT**

*Promoting the wise use of land  
Helping build great communities*

**Tentative Notice of Action**

MEETING DATE July 1 2011	CONTACT/PHONE Kerry Brown, Project Manager 781-5713	APPLICANT Tom Kellaway	FILE NO. D990336P
LOCAL EFFECTIVE DATE July 15, 2011			
APPROX FINAL EFFECTIVE August 5, 2011	kbrown@co.slo.ca.us		

**SUBJECT**  
A request by Tom Kellaway for a Minor Use Permit / Coastal Development Permit to allow a new two story 11,412 square-foot single family residence with attached 968 square-foot garage. The project will result in the disturbance of approximately 11,320 square feet on a 5-acre parcel. The proposed project is within the Residential Suburban land use category and is located on Sea Horse Lane, approximately 1075 feet south of Highland Drive, in the community of Los Osos. The site is in the Estero planning area.

- RECOMMENDED ACTION**
1. Adopt the Mitigated Negative Declaration in accordance with the applicable provisions of the California Environmental Quality Act, Public Resources Code Section 21000 et seq.
  2. Approve Minor Use Permit / Coastal Development Permit D990336P based on the findings listed in Exhibit A and the conditions listed in Exhibit B.

**ENVIRONMENTAL DETERMINATION**  
The Environmental Coordinator, after completion of the initial study, finds that there is no substantial evidence that the project may have a significant effect on the environment, and the preparation of an Environmental Impact Report is not necessary. Therefore, a Mitigated Negative Declaration (pursuant to Public Resources Code Section 21000 et seq. and CA Code of Regulations Section 15000 et seq.) has been issued on May 26, 2011 for this project. Mitigation measures are proposed to address aesthetics, biological resources, air quality, geology /soils, public services, transportation/ circulation, water resources and are included as conditions of approval.

LAND USE CATEGORY Residential Suburban	COMBINING DESIGNATION Local Coastal Plan, Coastal Appealable Zone	ASSESSOR PARCEL NUMBER 074-022-042	SUPERVISOR DISTRICT(S) 2
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**PLANNING AREA STANDARDS:**  
Septic Tank requirements and Drainage  
*Does the project meet applicable Planning Area Standards: Yes - see discussion*

**LAND USE ORDINANCE STANDARDS:**  
Setbacks  
*Does the project conform to the Land Use Ordinance Standards: Yes - see discussion*

**FINAL ACTION**  
This tentative decision will become the final action on the project, unless the tentative decision is changed as a result of information obtained at the administrative hearing or is appealed to the County Board of Supervisors pursuant Section 23.01.042 of the Coastal Zone Land Use Ordinance; effective on the 10th working day after the receipt of the final action by the California Coastal Commission. The tentative decision will be transferred to the Coastal Commission following the required 14 calendar day local appeal period after the administrative hearing.

The applicant is encouraged to call the Central Coast District Office of the Coastal Commission in Santa Cruz at (831) 427-4863 to verify the date of final action. The County will not issue any construction permits prior to the end of the Coastal Commission process.

ADDITIONAL INFORMATION MAY BE OBTAINED BY CONTACTING THE DEPARTMENT OF PLANNING & BUILDING AT:  
COUNTY GOVERNMENT CENTER ♦ SAN LUIS OBISPO ♦ CALIFORNIA 93408 ♦ (805) 781-5600 ♦ FAX: (805) 781-1242

EXISTING USES: Vacant	
SURROUNDING LAND USE CATEGORIES AND USES: North: Residential Suburban / single family residences & agricultural uses East: Residential Suburban / single family residences & agricultural uses South: Residential Suburban / single family residences West: Residential Single Family / single family residences	
OTHER AGENCY / ADVISORY GROUP INVOLVEMENT: The project was referred to: Los Osos Community Advisory Group, Public Works, Los Osos Community Services District, and the California Coastal Commission	
TOPOGRAPHY: Nearly level to gently sloping	VEGETATION: Grasses
PROPOSED SERVICES: Water supply: Golden State Water Company Sewage Disposal: Individual septic system Fire Protection: CalFire	ACCEPTANCE DATE: January 31, 2011

**DISCUSSION**

**PLANNING AREA STANDARDS:**

Estero Area Plan; Los Osos Urban Area

**On-Site Wastewater Disposal**

New development using on-site wastewater disposal systems shall protect coastal water quality and meet the requirements of the Regional Water Quality Control Board.

*In 1988, the California Regional Water Quality Control Board imposed a moratorium on new sources of sewage discharge in most of the community of Los Osos. This parcel is not included within the moratorium area. There is adequate area on the 5-acre parcel to provide a septic system that will not impact coastal water quality.*

**Drainage**

Los Osos Lowland Areas – Drainage Plan Requirement. In areas designated in Figure 7-40, all land use permit applications for new structures or additions to the ground floor of existing structures shall require drainage plan approval pursuant to Coastal Zone Land Use Ordinance Sections 23.05.040 et seq. unless the County Engineer determines that the individual project site is not subject to or will not create drainage problems.

*The applicant submitted a drainage plan, Tim Tomlinson of the Department of Public Works reviewed the proposed drainage plan and found the plan acceptable and determined that the project will not create drainage problems.*

**Residential Suburban Standards:**

Highland Area

**Site Selection**

Sites are to be selected as to preserve significant areas of ecological or public visual importance. All development shall be clustered to preserve a maximum of 60 percent of each parcel in undeveloped open space.

*The project site is dominated by sensitive vegetation. The area of disturbance is limited to less than 12,000 square feet, in addition 85% of the site will be preserved through an open space easement, and therefore the project is consistent with this standard.*

Slopes exceeding 20%  
No development shall occur on slopes exceeding 20%.

*The residence and driveway are located on slopes of approximately 10%.*

#### Building Exteriors

Building exteriors shall be principally composed of native materials and textures. Extensions, including roofs, shall be subdued natural hues and tones harmonizing with the colors of the natural environment.

*The project is required to minimize the structure massing of new development by reducing the contrast between the proposed development and the surrounding environment. Colors shall be compatible with the natural colors of the surrounding environment, including vegetation, rock outcrops, etc. Non-reflective, muted colors shall be selected for walls, chimneys etc. and darker green, grey, slate blue, or brown colors for the roof structures.*

#### LAND USE ORDINANCE STANDARDS

*Section 23.01.043 – Appeals to the Coastal Commission (Coastal Appealable Zone)*  
The project is appealable to the Coastal Commission because the project is proposed development between the ocean and first public road (Los Osos Valley Road).

#### *Section 23.04.100-112 Setbacks*

The required setbacks for the residence are as follows: front – 25 feet, sides – 30 feet, and rear – 30 feet.

*The project complies with the required setbacks.*

#### *Section 23.07.170 Environmentally Sensitive Habitats*

#### *Section 23.07.176 - Terrestrial Habitat Protection*

The provisions of this section are intended to preserve and protect rare and endangered species of terrestrial plants and animals by preserving their habitats. Emphasis for protection is on the entire ecological community rather than only the identified plant or animal.

Habitat creation and enhancement. Where the project results in an unavoidable loss (i.e., temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant. Plans for the creation of new habitat, or the enhancement of existing habitat, shall consider the recommendations of the California Coastal Commission, the California Department of Fish and Game and/or U.S. Fish and Wildlife Service. Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ("same-kind") and within the same biome ("same-system"), and shall be permanently protected by a deed restriction or conservation easement.

*The site is dominated by dense mixture of coastal dune scrub, maritime chaparral, and pygmy oak woodland and considered an unmapped Terrestrial Habitat, an Environmentally Sensitive*

*Habitat Area (ESHA) due to the presence of Morro Manzanita, a federally threatened plant and Morro shoulderband snail. The project is an infill project in an urban area, on a legal lot of record. The area of disturbance is limited to less than 12,000 square feet. The project includes restoration of damaged habitats (see condition number 27) and all Morro Manzanita plants removed will be replaced at a 5:1 ratio on-site. In addition 85% of the site will be protected in perpetuity in easements. The project also requires issuance of an incidental take permit (pursuant to section 10(a) (1) (B) of the Endangered Species Act of 1973) from the US Fish and Wildlife Service. The proposed project will not significantly impact the resource.*

#### COASTAL PLAN POLICIES

This project is in compliance with the Coastal Plan Policies, the most relevant policies are discussed below.

#### Public Works:

##### *Policy 1: Availability of Service Capacity:*

New development (including divisions of land) shall demonstrate that adequate public or private service capacities are available to serve the proposed development. Priority shall be given to infilling within existing subdivided areas. Prior to permitting all new development, a finding shall be made that there are sufficient services to serve the proposed development given the already outstanding commitment to existing lots within the urban service line for which services will be needed consistent with the Resource Management System where applicable. Permitted development outside the USL shall be allowed only if:

- a. It can be serviced by adequate private on-site water and waste disposal systems; and
  - b. The proposed development reflects that it is an environmentally preferable alternative.
- The applicant shall assume responsibility in accordance with county ordinances or the rules and regulations of the applicable service district or other providers of services for costs of service extensions or improvements that are required as a result of the project. Lack of proper arrangements for guaranteeing service is grounds for denial of the project or reduction of the density that could otherwise be approved consistent with available resources.

*The project is within the Los Osos Valley Groundwater Basin. The total basin safe yield is 3250 afy. Total basin demand is currently estimated at approximately 3,400 afy. Therefore, the demand exceeds safe yield with a current deficit of approximately 150 afy. The Board of Supervisors certified a Level of Severity III for the Basin on March 27, 2007. The proposed project is an infill project within an existing subdivided area in order to be consistent with this policy, the applicant is required to retrofit existing water fixtures to result in a savings of 900 gallon per day (consistent with Title 19).*

#### Coastal Watersheds:

##### *Policy 7: Siting of new development:*

Grading for the purpose of creating a site for a structure or other development shall be limited to slopes of less than 20 percent except: Existing lots of record in the Residential Single-Family category and where a residence cannot be feasibly sited on a slope less than 20 percent; When grading of an access road or driveway is necessary to provide access to an area of less than 20 percent slope where development is intended to occur, and where there is no less environmentally damaging alternative; The county may approved grading and siting of development on slopes between 20 percent and 30 percent through Minor Use Permit, or Development Plan approval, if otherwise required by the Coastal Zone Land Use Ordinance. Also in review of proposed land divisions, each new parcel shall locate the building envelope and access road on slopes of less than 20 percent. In allowing grading on slopes between 20 percent and 30 percent the county shall consider the specific characteristics of the site and surrounding area that include but are not limited to: the proximity of nearby streams or wetlands, the erosion potential and slope stability of the site, the amount of grading necessary,

neighborhood drainage characteristics and measures proposed by the applicant to reduce potential erosion and sedimentation. The county may also consider approving grading on slopes between 20 percent and 30 percent where it has been demonstrated that there is no other feasible method of establishing an allowable use on the site without grading. Grading and erosion control plans shall be prepared by a registered civil engineer and accompany any request to allow grading on slopes between 20 percent and 30 percent. It shall also be demonstrated that the proposed grading is sensitive to the natural landform of the site and surrounding area. In all cases, siting of development and grading shall not occur within 100 feet of any environmentally sensitive habitat. In urban areas as defined by the Urban Services Line, grading may encroach within the 100 foot setback when locating or siting a principally permitted development, if application of the 100 foot setback renders the parcel physically unusable for the principally permitted use. Secondly, the 100 foot setback shall only be reduced to a point at which the principally permitted use, as modified as much as practical from a design standpoint, can be accomplished to no point less than the setback allowed by the planning area standard or 50 feet whichever is the greater distance.

*The proposed project is consistent with this policy because the new residence will be located on slopes of less than 20 percent.*

*Policy 8: Timing of new construction:*

Land clearing and grading shall be avoided during the rainy season if there is a potential for serious erosion and sedimentation problems. All slope and erosion control measures should be in place before the start of the rainy season. Soil exposure should be kept to the smallest area and the shortest feasible period.

*The proposed project is consistent with this policy because the project is required to have an erosion and sedimentation control plan and all sedimentation and erosion control measures will be in place before the start of the rainy season.*

**Does the project meet applicable Coastal Plan Policies:** Yes, as conditioned

**ENVIRONMENTAL DETERMINATION:**

The site is dominated by dense mixture of coastal dune scrub, maritime chaparral, and pygmy oak woodland. The endangered Morro shoulderband snail and threatened Morro manzanita plant were detected in biological surveys of the site. The applicant has applied for a permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544, 87 Stat. 884) as amended (Act), from the U.S. Fish and Wildlife Service for incidental take of the federally endangered Morro shoulderband snail. The applicants submitted a Habitat Conservation Plan to minimize and mitigate for impacts to the Morro shoulderband snail and Morro Manzanita [currently under review with the US Fish and Wildlife Service (USFWS)] that may result from the development of the proposed residence. A Mitigated Negative Declaration (pursuant to Public Resources Code Section 21000 et seq. and CA Code of Regulations Section 15000 et seq.) has been issued on May 26, 2011 for this project. Mitigation measures are proposed to address aesthetics, biological resources, air quality, geology /soils, public services, transportation/ circulation, water resources and are included as conditions of approval. Please refer to the attached Mitigated Negative Declaration for more information.

**COMMUNITY ADVISORY GROUP COMMENTS:**

The project was referred to the Los Osos Community Advisory Council (LOCAC) in May 2000 and October 2010. LOCAC reviewed the project on October 28, 2010. By a majority vote LOCAC recommends approval of the project with four discussion items as discussed below.

**CCC Exhibit B**  
**(page 13 of 14 pages)**

LOCAC comment	Staff comment
<p>The size of the proposed residence is much larger than what is typically proposed; however, the size and location of the property was noted. It is not anticipated that the structure will be visible from LOVR.</p>	<p>Agreed</p>
<p>The number of bathrooms is also more than what is typically proposed. There is concern for the additional water that will be drawn from the aquifer. The applicant will be required to install low-flow fixtures AND retrofit a number of bathrooms in the community.</p> <p>LOCAC would like to know how many bathroom retrofits will be required and if the Planning Department is keeping track of retrofits?</p>	<p>The applicant will be required to retrofit enough existing bathrooms to off-set their water demand by a 2:1 ratio.</p> <p>The number of bathrooms retrofitted depends on the type of fixtures being replaced and the County will not know the number until the applicant submits their worksheet. The County does keep track of the retrofits.</p>
<p>LOCAC is most concerned about the lack of regulation for projects of this size that are located "outside the Prohibition Zone" which obviously will benefit from existing water resources but not be required to contribute to the management of the Basinwide Plan.</p>	<p>Comment noted.</p>
<p>Some concern over number of bedrooms and baths such that the use may evolve into a vacation rental, or other use than SF Residential. Can a condition be applied that in the future this would always be a residential single-family use and never be used as a vacation rental or some kind of private convention or executive meeting venue?</p>	<p>A use such as vacation rental or event facility would require a new land use permit to establish such use. Public assembly and entertainment is not an allowed use in the Residential Suburban land use category.</p>

**AGENCY REVIEW:**

Public Works – Recommend approval  
 CalFire - No response  
 Coastal Commission – No response

**LEGAL LOT STATUS:**

The lot was legally created by a recorded map at a time when that was a legal method of creating lots.

Staff report prepared by Kerry Brown and reviewed by Nancy Orton.



**CALIFORNIA COASTAL COMMISSION**

CENTRAL COAST DISTRICT OFFICE  
 725 FRONT STREET, SUITE 300  
 SANTA CRUZ, CA 95060-4508  
 VOICE (831) 427-4863 FAX (831) 427-4877

**APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT**

**Please Review Attached Appeal Information Sheet Prior To Completing This Form.**

**SECTION I. Appellant(s)**

Name: California Coastal Commission; Commissioners Mark Stone and Brian Brennan

Mailing Address: 45 Fremont Street, Suite 2000

City: San Francisco, CA

Zip Code: 94105

Phone: (415) 904-5200

**SECTION II. Decision Being Appealed**

1. Name of local/port government:

San Luis Obispo County

2. Brief description of development being appealed:

Construct a two-story, 11,412 square foot single family residence with an attached 968 square foot garage and driveway.

3. Development's location (street address, assessor's parcel no., cross street, etc.):

Sea Horse Lane, Los Osos (San Luis Obispo County) APN 074-022-042

4. Description of decision being appealed (check one.):

- Approval; no special conditions  
 Approval with special conditions:  
 Denial

**RECEIVED**

AUG 03 2011

California Coastal Commission,  
 Central Coast Area

**Note:** For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

**TO BE COMPLETED BY COMMISSION:**

APPEAL NO: A-3-SLO-11-055

DATE FILED: August 4, 2011

DISTRICT: Central Coast

**CCC Exhibit** C  
 (page 1 of 5 pages)

**APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)**

5. Decision being appealed was made by (check one):

- Planning Director/Zoning Administrator
- City Council/Board of Supervisors
- Planning Commission
- Other

6. Date of local government's decision: July 1, 2011

7. Local government's file number (if any): D990336P

**SECTION III. Identification of Other Interested Persons**

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

Tom Kellaway  
P.O. Box 480500  
Kansas City, MO 64148

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) Robert Semonsen, 1120 4th Street, Los Osos, CA 93402

(2) Nancy Orton, San Luis Obispo County Planning Department, 976 Osos St., Rm. 300, San Luis Obispo, CA 93408

(3)

(4)

State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signed: Moh. St  
Appellant or Agent

Date: August 3, 2011

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

**SECTION V. Certification**

The information and facts stated above are correct to the best of my/our knowledge.



\_\_\_\_\_  
Signature of Appellant(s) or Authorized Agent

Date: \_\_\_\_\_

8/2/11

**Note:** If signed by agent, appellant(s) must also sign below.

**Section VI. Agent Authorization**

I/We hereby  
authorize \_\_\_\_\_

to act as my/our representative and to bind me/us in all matters concerning this appeal.

\_\_\_\_\_  
Signature of Appellant(s)

Date: \_\_\_\_\_

**Reasons for Appeal: San Luis Obispo County Coastal Development Permit Application D990336P (Kellaway)**

San Luis Obispo County approved a coastal development permit (CDP) to construct a two-story 11,412 square-foot single-family residence with an attached 968 square-foot garage and a driveway on a vacant property accessed from Sea Horse Lane in the community of Los Osos near Morro Bay in San Luis Obispo County. The County-approved project raises Local Coastal Program (LCP) conformance issues and questions as follows:

The approved project is located on a 5-acre undeveloped site that is made up of a habitat mosaic of coastal dune scrub, maritime chaparral, and oak woodland that supports and includes sensitive species habitat, including for the endangered Morro shoulderband snail and the threatened Morro manzanita. The entire site is an environmentally sensitive habitat area (ESHA) deemed terrestrial habitat (TH) ESHA by the LCP that is connected to even larger areas of undisturbed TH ESHA extending to the south and the east. The LCP requires preservation and protection of such ESHA, and emphasizes protection of the entire ecological community over individual plants and/or animals (including LCP environmentally sensitive habitat Policies 1, 2, 29, and 30, and LCP Coastal Zone Land Use Ordinance (CZLUO) Sections 23.07.170 and 23.07.176). When TH ESHA is determined, as the County did in this case, use and development in such areas is limited to only that associated with those uses that are dependent on the ESHA resource, and only where such use and development does not result in significant disruption to ESHA. When application of this and related LCP policies will lead to a taking of private property, the LCP provides a process for allowing certain limited development as a means to avoid such a takings. In such extraordinary circumstances, only the least amount of development necessary to avoid such a takings, including in terms of avoiding impacts to the maximum extent feasible, is allowed, and all adverse impacts to the ESHA must be fully mitigated (CZLUO Section 23.07.170).

In this case, the County-approved project allows for approximately 12,400 square feet of residential structures (house and attached garage), and a driveway from Sea Horse Lane, in an approved development envelop of approximately three-quarters of an acre. Per the LCP, such use and development is not allowed in ESHA, and is thus not approvable absent the need to avoid a takings. There is neither evidence nor discussion in the County's action notice indicating that a takings issue is raised, and absent such conclusion, the approved project is categorically inconsistent with the LCP. Even if approval of development to avoid a takings is required per the LCP in this case, not only is the information and discussion regarding such takings missing from the County's action, but it would appear that allowing such a large area of ESHA to be removed and defined as a development area is inconsistent with the LCP as well. An approximately 32,000 square-foot development area and an approximately 12,400 square-foot house/garage are large areas of disturbance and development generally, and appear even more excessive under the LCP for an all-ESHA site such as this. Such development does not appear to be 'the least amount necessary', and does not appear to 'avoid ESHA impacts to the maximum extent feasible' as required by the LCP. And although the County's approval requires the rest of the site to be preserved through easement, it does not appear that the offsetting mitigation applied (i.e., enhancement of about one-quarter acre of coastal dune scrub on-site, four years of monitoring and maintenance of such enhancement area, and replanting of oaks and manzanitas removed to facilitate residential development at 4 and 5 to 1 ratios respectively) sufficiently offsets the adverse impacts to ESHA from the County-approved project. Such impacts include direct removal impacts to ESHA from the development and the development envelop itself, as well as the indirect impacts to surrounding ESHA from the introduction of such use and development into the center of the all-ESHA site.

In short, it does not appear that the County-approved project is consistent with the LCP's ESHA and related requirements, and the County-approved project warrants further Commission review and deliberations regarding these issues.

**The Law Office of Marshall E. Ochylski**

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**Delivery via Email**

**Original to Follow via Overnight Delivery**

**For Distribution to California Coastal Commissioners, Alternates, and Staff**

September 2, 2011

Mr. Jonathan Bishop  
Central Coast Area Office  
California Coastal Commission  
725 Front Street, Suite 300  
Santa Cruz, CA 95060

**Subject: California Coastal Commission September 2011 Meeting**  
**Agenda Item: F11a**  
**Kellaway Single-Family Residence (A-3-SLO-11-055)**  
**(San Luis Obispo County Coastal Development Permit Application Number:**  
**D99036P)**

This office has been authorized to submit the following comments to the Coastal Commission on behalf of Mr. Tom Kellaway, the applicant, in regard the Substantial Determination Issue on the Coastal Commission's September 2011 Agenda.

This letter addresses the issues raised in the Staff recommendation that the Coastal Commission find substantial issue with the proposed single-family residence as approved and conditioned by the County of San Luis Obispo.

We respectfully request that the California Coastal Commission not find that this project raises a substantial issue and that the Coastal Commission not take jurisdiction over the permit.

**Introduction**

According to the Staff Report, the Coastal Commission should find substantial issue and take jurisdiction over the project because the project raises Local Coastal Plan ("LCP") conformance issues related to core LCP Environmentally Sensitive Habitat Area ("ESHA") preservation and protection issues.

## **Compliance with the San Luis Obispo Coastal Zone Land Use Ordinance**

A review of the Staff Report finds a number of facts that require clarification which we believe will lead the Coastal Commission to find that the project as approved by the Coastal Commission is in conformance with the certified LCP of the County of San Luis Obispo.

### Project Location (Staff Report – Page 3)

In the Staff Report, the location of the project is stated as “near the ‘back bay’ portion of Morro Bay. This statement may lead to the conclusion that the project is on or adjacent to the bay, however the actual location of the project is approximately 1 mile from the bay and at a significantly higher elevation. As further clarification, 6 of the 8 adjacent properties are fully developed and this property should actually be considered “in-fill” rather than development in a pristine area.

### Project Description (Staff Report - Page 4)

Although the Staff Report is correct in its statement regarding the square footage of the two-story building, the actual footprint of the residence/garage structure is only 7,466 square feet. It is this smaller number is the one which should be considered when evaluating the impact of the structure on the land.

When considered the size of the development envelope which is correctly stated as approximately three-quarters of an acre, it must be taken into account that this envelope includes a 30 foot firebreak required by CalFire.

### Analysis (Staff Report - Page 10)

We do not agree that absent a formal “takings” analysis that the approved project is categorically inconsistent with the LCP. Staff points to a lack of “evidence” or “discussion” in the County’s notice that such an issue was raised. Clearly the weight of the facts is contrary to that conclusion.

As stated in the County’s Staff Report which is attached to the Coastal Commission Staff Report for this item, there was an thorough environmental analysis of the impacts of proposed development on this property and all environmental impacts were mitigated to the satisfaction of not only the County, but also the U. S. Department of Fish and Wildlife (“USFW) and the California Department of Fish and Game (“DFG”). In fact, there were over 6 consultations made with these agencies which resulted in 3 distinct iterations of the project, dealing with location, size, and height. The stated goal throughout this entire process was to mitigate the environmental impacts while still addressing the “reasonable investment expectations” of the applicant. This is the requirement under the current state of “takings” law and properly applied in this application’s approval process. The fact that these consultations are not discussed in the Coastal Commission Staff Report which leaves the wholly inaccurate impression that no “other types, locations, and sizes of development” were evaluated.

The following excerpt from the County's Staff Report shows how the Terrestrial Habitat was addressed and protected in the approved project.

*Section 23.07.170 Environmentally Sensitive Habitats Section 23.07.176 -Terrestrial Habitat Protection*

*The provisions of this section are intended to preserve and protect rare and endangered species of terrestrial plants and animals by preserving their habitats. Emphasis for protection is on the entire ecological community rather than only the identified plant or animal.*

*Habitat creation and enhancement. Where the project results in an unavoidable loss (i.e. temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant. Plans for the creation of new habitat, or the enhancement of existing habitat, shall consider the recommendations of the California Coastal Commission, the California Department of Fish and Game and/or U.S. Fish and Wildlife Service. Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ("same-kind") and within the same biome ("same-system"), and shall be permanently protected by a deed restriction or conservation easement. The site is dominated by dense mixture of coastal dune scrub, maritime chaparral, and pygmy oak woodland and considered an unmapped Terrestrial Habitat, an Environmentally Sensitive Habitat Area (ESHA) due to the presence of Morro Manzanita, a federally threatened plant and Morro shoulderband snail. The project is an infill project in an urban area, on a legal lot of record. The area of disturbance is limited to less than 12,000 square feet. The project includes restoration of damaged habitats (see condition number 27) and all Morro Manzanita plants removed will be replaced at a 5:1 ratio on-site. In addition 85% of the site will be protected in perpetuity in easements. The project also requires issuance of an incidental take permit (pursuant to section 10(a) (1) (B) of the Endangered Species Act of 1973) from the US Fish and Wildlife Service. **The proposed project will not significantly impact the resource.** [Emphasis Added.]*

Further, the statement that a " cursory review of surrounding properties and developments show that this project would be the largest in the area" is simply not supported by the facts. All but 2 of the adjacent developed properties have significantly larger impact footprints. Further the comment that this project "could be one of the largest houses in the entire community of Los Osos" is speculative at best and wholly irrelevant.

Finally, the Staff Report states that the offsetting mitigation consists of "enhancement," however the offsetting mitigation is actually "restoration" and meets all the requirements of both USFW and DFG as evidenced by the Habitat Conservation Plan.



Substantial Issue Determination Conclusion (Staff Report - Page 12)

The Staff Report makes the statement that the area of the development is excessive under the LCP; however that is clearly not true as proven by the concurrence of both USFW and DFG. In fact both these Departments were instrumental in shaping the current project and are supportive of the project as presently configured and approved.

Finally, the Staff Report raises the issue of the County's action in this matter having the "potential to prejudice future action." This statement is clearly irrelevant to the Coastal Commission discussion of substantial issue regarding this specific permit. If the Coastal Commission has issues with future actions that the County may take, the Coastal Commission needs to address this matter directly with the County and not use an innocent party as the vehicle for those discussions. Even if such a statement were appropriate in the discussion of this project, it should be noted that this project had been in the review and approval process for over 9 years with work on the HCP already commenced and nearing completion before the ESHA amendment to the LCP was certified. Clearly these facts are likely inapplicable to any other pending permits.

**Conclusion:**

As discussed above, the final action taken by the County of San Luis Obispo in this matter is consistent with the policies of the San Luis Obispo's certified Coastal Zone Land Use Ordinance, other County ordinances, and State law. There is simply no factual or legal basis for the Coastal Commission finding a substantial issue and taking jurisdiction over this permit.

Thank you for your consideration. If you have any question, or would like to discuss this matter further, I may be reached by telephone at (805)544-4546, or by email at [mochylski@slollegal.com](mailto:mochylski@slollegal.com).

Sincerely,



Marshall E. Ochylski,  
Attorney at Law

MEO/ec