

CALIFORNIA COASTAL COMMISSION

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Hearing Date: March 7-10, 2006

STAFF REPORT AND RECOMMENDATION ON APPEAL
SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with conditions

APPEAL NO.: A-6-ENC-06-005

APPLICANT: McCullough-Ames Development, Inc.

PROJECT DESCRIPTION: Construct an approximately 200-ft. long, 30-inch diameter storm drain with concrete energy dissipater and riprap on an existing vacant lot resulting in approximately .014 acre (610 sq. ft.) of impacts to riparian vegetation within Lux Canyon Creek.

PROJECT LOCATION: 1328 Berryman Canyon Road, Encinitas, San Diego County.
APN 262-080-06

APPELLANTS: Commissioner Pat Kruer, Commissioner Stephen Padilla and Donna Westbrook.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that a substantial issue exists with respect to the grounds on which the appeal has been filed.

SUBSTANTIVE FILE DOCUMENTS: Appeal Applications by Commissioners Kruer and Padilla dated 1/20/06; Appeal Application by Donna Westbrook dated 1/20/06; City of Encinitas Certified LCP; Case No. 01-239 TM/MUP/DR/EIA/CDP; Case No. 05-135 CDP/EIA; "Berryman Canyon Road, Offsite Stormwater Improvements, Encinitas, Ca" by REC Consultants, Inc. dated 9/2/05; "Wetlands Delineation Report for Stahmer Property, Assessor's Parcel Number 262-080-06-00, City of Encinitas, California" by Dudek and Associates dated March 9, 2004.

I. Appellants Contend That: The City's decision is inconsistent with several provisions of the City's LCP which relate to protection of wetlands. The appellants assert that the proposed project, which will impact .014 acres of wetlands, is not a permitted use in wetlands as an incidental public service project, since the primary purpose of the project is to control runoff from a pending 14-lot subdivision that the City recently approved in the Coastal Zone. In addition, the appellants assert that the LCP prohibits subdivisions from being approved if they impact wetlands. The appellants also assert that even if this storm drain project were an allowable use within wetlands, the mitigation required by the City is inconsistent with the LCP because it fails to require the creation of new wetlands. The appellants also assert the amount of wetland impact has not been clearly identified since the City's conditional approval required a more accurate field study be performed and, therefore, the City has approved new development without knowing the full extent of wetland impacts. Finally, the appellants assert that the subject coastal development permit should have been processed as an amendment to the original subdivision project since the storm drain system has been designed primarily to serve the subdivision and the applicant for the subdivision and the storm drain are the same.

II. Local Government Action. The coastal development permit was approved by the City of Encinitas Planning Commission on December 15, 2005. Specific conditions were attached which, among other things, require mitigation for the wetland habitat at a 3:1 replacement ratio and that mitigation be implemented through either: 1) purchase of wetland mitigation credits from an agency approved mitigation bank; 2) submission of a wetland creation, restoration, and or enhancement plan or; 3) provision of an in-lieu monetary contribution for invasive plant removal within the Carlsbad watershed (which includes areas within the City of Encinitas). Other conditions require the submission of erosion control plans, securing an easement and maintenance agreement from/between the property owner and the developer for installation and maintenance of the storm drain structure, and submission of a field survey to verify the extent of wetlands impact. In addition, a condition was included that states all conditions of approval for the original 14-lot subdivision (Case No. 01-239 TM/MUP/DR/EIA/CDP) "shall remain in full force and effect except as specifically modified herein."

III. Appeal Procedures. After certification of a municipality's Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permit applications. One example is that the approval of projects within cities and counties may be appealed if the projects are located within mapped appealable areas. The grounds for such an appeal are limited to the assertion that "development does not conform to the standards set forth in the certified local coastal program or the [Coastal Act] public access policies." Cal. Pub. Res. Code § 30603(b)(1).

After the local government has taken final action on an appealable project, it must send a notice of that final action (NOFA) to the Commission. Cal. Pub. Res. Code § 30603(d); 14 C.C.R. § 13571. Upon proper receipt of a valid NOFA, the Commission establishes

an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30603(c); 14 C.C.R. § 13110 and 13111(b). If an appeal is filed during the appeal period, the Commission must “notify the local government and the applicant that the effective date of the local government action has been suspended,” 14 C.C.R. § 13572, and it must set the appeal for a hearing no later than 49 days after the date on which the appeal was filed. Cal. Pub. Res. Code § 30621(a).

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of the sort involved here unless the Commission determines that no substantial issue is raised by the appeal. If the staff recommends “substantial issue” and no Commissioner objects, the Commission will proceed directly to a de novo hearing on the merits of the project.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If the appeal is found to raise a substantial issue, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts a de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Coastal Act requires that, for a permit to be granted, a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act.

The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo hearing, any person may testify.

IV. Staff Recommendation On Substantial Issue.

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission determine that Appeal No. A-6-ENC-06-005 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local 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 No. *A-6-ENC-06-005* presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan.

V. Findings and Declarations.

1. Project Description/Permit History. The proposed development involves the installation of an approximately 200-ft. long, 30-inch diameter storm drainpipe with concrete energy dissipater and riprap on an existing vacant lot. The proposed storm drain will extend from Berryman Canyon Road (adjacent to the east side of an approved – but not yet completed – 14-lot subdivision) across an approximately 60,113 sq. ft. vacant lot and then outlet at the bottom of the Lux Canyon Creek. Placement of necessary energy dissipaters and riprap will result in direct impacts to approximately .014 acres (610 sq. ft.) of riparian wetlands vegetation within Lux Canyon Creek, which the applicant’s biological report identifies as approximately .014 acre of “southern willow scrub”. The report identifies that “[w]etland communities (southern willow scrub) are considered a sensitive and declining resource by several regulatory agencies including ACOE, CDFG and USFWS” (Ref. “Berryman Canyon Road, Offsite Stormwater Improvements, Encinitas, Ca” by REC Consultants, Inc. dated 9/2/05). In addition, the applicant has performed a wetlands delineation of the subject property which details the importance of southern willow scrub:

Riparian habitat, the broader classification which encompasses southern willow scrub and other wetland communities, is considered to be sensitive by both state and federal resource agencies as well as local jurisdictions and private conservation organizations due to serious habitat fragmentation and loss caused primarily by development. It is a rare habitat in southern California where rainfall is low and rivers and streams tend to be small and intermittent. Riparian scrub habitats contain among the greatest diversity of animal species and are considered to be significant for both their ecological function and regulatory implications. (Ref. “Wetlands Delineation Report for Stahmer Property, Assessor’s Parcel Number 262-080-06-00, City of Encinitas, California” by Dudek and Associates dated March 9, 2004.)

The subject site is surrounded by the Somerford Alzheimer Residential Care Facility to the south, El Camino Real (a major circulation road) to the east, an approximately 7.9 acre vacant lot the east (site of the 14-lot subdivision referenced above) and residential structures located approximately 2 lots to the north. The storm drain improvements are proposed to serve existing development, the pending development of a 14-lot subdivision and future developments within the watershed. Separate from the proposed development, the subject applicant received a coastal development permit from the City of Encinitas in 2003 for the 14-lot subdivision referenced above, which included 11 single-family lots, two private road lots and one open space lot that is located to the east of the subject lot (City permit No. 01-239/MUP/CDP/EIA). The subdivision is to take place in an area within the City of Encinitas' certified Local Coastal Program permit jurisdiction but outside of the area where its approval would have been subject to appeal to the Commission. The subject permit for the storm drain improvement is also within the City's permit jurisdiction, but because it lies within 100 ft. of a stream or wetlands, the permit for it is appealable to the Commission.

Conditions of approval for the 14-lot subdivision required approval by the City's engineering department of all storm water improvements. Based on a hydrology report prepared by the applicant and submitted to the City prior to the City's action on the proposed subdivision, the City approval assumed that all storm water runoff from the 14-lot subdivision could be accommodated by existing surrounding storm drains. After approval of the subdivision, the City determined that the hydrology information prepared for the subdivision was in error and that additional off-site drainage improvements would be necessary to serve the subdivision. (Until this issue is resolved, the subdivision's Final Map cannot be recorded.) As a result, after reviewing several alternatives, the City approved a new and separate coastal development permit for the construction of the subject 200-ft. long storm drain to accommodate the subdivision.

The City asserts that the proposed project is to accommodate not only this subdivision but also is designed to address runoff from existing, surrounding development and future developments near the proposed storm drain location. However, the appellants assert the primary purpose of the proposed drainage improvements is to accommodate the 14-lot subdivision located to the east of the subject site. Specific Condition "F" of the subject coastal development permit for the subject storm drain includes a condition identifying that all conditions of approval for the 14-lot subdivision "shall remain in full force and effect except as specifically modified herein" (Ref. attached Exhibit #3).

2. Non Compliance with the Certified LCP.

The appellants assert that the project as approved by the City is inconsistent with several wetland protection policies of the certified LCP. The appellants assert that the primary inconsistencies are with Resource Management (RM) Policy 10.6 of the LCP, which states, in relevant part:

The City shall preserve and protect wetlands within the City's planning area.

[. . .]

There shall be no net loss of wetland acreage or resource value as a result of land use or development, and the City's goal is to realize a net gain in acreage and value when ever possible.

Within the Coastal Zone, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following newly permitted uses and activities:

- a. Incidental public service projects.
- b. Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
- c. Restoration purposes.
- d. Nature study, aquaculture, or other similar resource dependent activities.

[. . .]

Identification of wetland acreage and resource value shall precede any consideration of use or development on sites where wetlands are present or suspected. With the exception of development for the primary purpose of the improvement of wetland resource value, all public and private use and development proposals which would intrude into, reduce the area of, or reduce the resource value of wetlands shall be subject to alternatives and mitigation analyses consistent with Federal E.P.A 404(b)(1) findings and procedures under the U.S. Army Corps permit process. Practicable project and site development alternatives which involve no wetland intrusion or impact shall be preferred over alternatives which involve intrusion or impact. Wetland mitigation, replacement or compensation shall not be used to offset impacts or intrusion avoidable through other practicable project or site development alternatives. When wetland intrusion or impact is unavoidable, replacement of the lost wetland shall be required through the creation of new wetland of the same type lost, at a ratio determined by regulatory agencies with authority over wetland resources, but in any case at a ratio of greater than one acre provided for each acre impacted so as to result in a net gain. Replacement of wetland on-site or adjacent, within the same wetland system, shall be given preference over replacement off-site or within a different system.

[. . .]

All wetlands and buffers identified and resulting from development and use approval shall be permanently conserved or protected through the application of an open space easement or other suitable device.

The City shall not approve subdivisions or boundary line adjustments which would allow increased impacts from development in wetlands or wetland buffers.

The appellants assert that RM Policy 10.6 of the City's LCP prohibits subdivisions which allow impacts to wetlands. This prohibition is clear in the final paragraph quoted above, but it is also true that subdivisions are not listed as a permitted use in the part of the policy quoted on the prior page. While the project before the Commission on appeal is for a new storm drain pipe, it appears to be necessitated by the 14-lot subdivision previously approved by the City on the adjacent western approximately 7.9 acre site. Had the City known that necessary runoff requirements for the subdivision would result in the need to impact wetlands, as cited above, approval of the subdivision would not have been consistent with the certified LCP.

In addition, the appellants assert that since the primary purpose of the project is to accommodate the new development that will occur as a result of the adjacent 14-lot subdivision, the proposed project does not qualify as an "incidental public service project". The phrase "incidental public service project" is not defined in the City's LCP. However, it is clearly intended to mimic similar language in the analogous section of the Coastal Act. See Cal. Pub. Res. Code § 30233(a) ("... filling ... of open coastal waters, wetlands, estuaries, and lakes ... shall be limited to the following... ¶ (5) Incidental public service purposes ..."). That language is not defined within the Coastal Act either, but the courts have interpreted it to mean that expansion of a traffic conduit that required fill of a wetland could not be allowed as an "incidental public service purpose" when it was "needed to accommodate future traffic created by local and regional development in the area." Bolsa Chica Land Trust v. Superior Court (1999), 71 Cal. App. 4th 493, 517. Accordingly, in this case, the "incidental public service project" provision of the City's LCP cannot be interpreted to allow a wholly new conduit for runoff necessitated by new local development. The construction of new storm drain improvements or upgraded utility improvements to accommodate existing development within the City might be considered an "incidental public service project," but filling wetlands with storm drain improvements to accommodate a new subdivision is not an "incidental public service project". Thus, the local approval appears to be inconsistent with the LCP.

In addition, the appellants assert that even if this were an "incidental public service project," and thus allowable under RM Policy 10.6 of the City's LCP, the City's approval would still be inconsistent with that policy since permitted uses still must be mitigated consistent with the LCP. As cited above, RM Policy 10.6 requires that permitted fill or impact to wetlands be replaced through the "creation of new wetland of the same type lost". Appellants point out that, in approving the approximately .014 acres of riparian wetlands impact, the City did not require the impacted wetlands be mitigated by the creation of new wetlands of the same type lost. Instead, the City's approval allowed the applicant the choice of paying an in-lieu fee for invasive plant removal in the Carlsbad

watershed (which involves several cities including Encinitas), the purchase of wetland mitigation credits from an approved mitigation bank, or the submission of a “wetland creation, restoration, and/or enhancement plan.” The appellants identify that the LCP requires wetland creation for permitted wetland fill or impacts. Therefore, even if this were a permitted use, the appellants assert that the City’s approval is inconsistent with the requirements of the LCP as it relates to wetlands protection. The appellants also assert that RM Policy 10.6 requires that any wetland affected by development shall be protected by the application of an open space easement or other device. In this case, no open space easement or other measure was required. Thus, again, the approval appears inconsistent with the LCP.

An additional concern raised by the appellants is that the extent of wetland impacts were not completely determined prior to approval. Specific Condition #I of the City’s permit, identifies that the design of the proposed storm drain discharge was based on an aerial topographic map and that a more accurate field survey must be conducted prior to finalization of the grading plan. As a result, the Specific Condition identifies that “[a]dditional rip rap protection at the proposed storm drain outfall may be needed when more accurate creek geometry is provided on the grading plan” (Ref. attached Exhibit #3). Thus, the extent of the proposed project’s impact on wetland resources has not yet been identified. This is, again, inconsistent with RM Policy 10.6 of the City’s LCP, which states that identification of “wetland acreage shall precede any consideration of use or development on sites where wetlands are present or suspected.”

Finally, the appellants assert the proposed development should have been processed as an amendment to the original subdivision project since it appears a primary purpose of the subject project is to accommodate the subdivision. Since the applicant is the same as that for the subdivision and the City’s Specific Condition #F links this approval to the subdivision approval, the appellants’ assertion raises concerns with the City’s permitting process in this case.

In summary, the proposed storm drain and outfall/dissipater device will impact approximately .014 acre of riparian wetland within Lux Canyon Creek primarily in order to accommodate a new subdivision. RM Policy 10.6 of the certified LCP prohibits the City from approving subdivisions that impact wetlands. The City has failed to adequately demonstrate the impacts to wetlands are a permitted use and, even if they are, the City has failed to adequately mitigate the loss of approximately .014 acre of riparian wetland consistent with the requirements of the LCP. The City has also failed to identify the affected wetland acreage prior to considering the application.

Based on the information that has been provided by the appellants, it appears the City approval of the storm drain system is inconsistent with Resource Management Policy 10.6 of the City’s LCP. Therefore, the Commission finds that a substantial issue exists with respect to the consistency of the local government action with the City’s certified Local Coastal Program.