

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE
710 E STREET • SUITE 200
EUREKA, CA 95501-1865
VOICE (707) 445-7833
FACSIMILE (707) 445-7877

MAILING ADDRESS:
P. O. BOX 4908
EUREKA, CA 95502-4908



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Staff: Jim Baskin
Staff Report: June 2, 2006
Hearing Date: June 16, 2006
Commission Action:

STAFF REPORT: APPEAL

SUBSTANTIAL ISSUE

APPEAL NO.: **A-1-EUR-06-028**

APPLICANT: **Eureka Pacific LLC**

LOCAL GOVERNMENT: City of Eureka

DECISION: Approval with Conditions

PROJECT LOCATION: At the southwest corner of the intersection of Vigo Street and Broadway (Highway 101), 2616 Broadway, Eureka; APNs 007-121-005 & -007.

PROJECT DESCRIPTION: *Vigo Street Mixed Use Development* – Construction of approximately 37,750 square-feet of retail commercial sales and service structural improvements on two boundary-adjusted parcels comprising a combined area of approximately 3.0 acres situated between Highway 101 and Maurer Marsh.

APPELLANTS: Commissioners Sara Wan and Meg Caldwell.

**SUBSTANTIVE FILE:
DOCUMENTS**

- 1) City of Eureka Coastal Development Permit CDP 04-009;
- 2) City of Eureka Conditional Use Permit C-04-007; and
- 3) City of Eureka Local Coastal Program.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after conducting a public hearing, determine that a substantial issue exists with respect to the grounds on which the appeal has been filed, and that the Commission open and continue the *de novo* portion of the appeal hearing, because the appellants have raised a substantial issue with the local government's action and its consistency with the certified LCP.

The Eureka City Council approved with conditions a coastal development use permit for the development of 37,750 square-feet of structures and related site improvements within two boundary-adjusted parcels totaling three acres located between Highway 101 and Maurer Marsh, along the Highway 101 corridor through the southwestern side of the City of Eureka, Humboldt County.

The appellants contend that the approved project raises a substantial issue of conformance with the City's LCP policies pertaining to the protection of environmentally sensitive habitat areas (ESHAs). Specifically, the appellants question the authorized development's with respect to: (a) whether the project has been designed and sited to prevent impacts to adjacent environmentally sensitive habitat areas in terms of the adequacy of the reduced-width, ten-foot-wide buffer between site improvements and wetlands, and if a feasible opportunity to partially restore the integrity of the adjoining wetlands through the application of a wider buffer or incorporation of other enhancements were overlooked; (b) if requisite consultations with the California Department of Fish and Game regarding buffer requirements and consideration of that agency's comments were adequately undertaken; and (c) the lack of the incorporation of attractively designed and strategically located informational signs within wetland buffer areas.

Staff recommends that the Commission find that the development, as approved by the City, raises a substantial issue of conformance with the policies of the certified LCP regarding the protection of ESHAs. The approved project would provide for wetland buffers of ten feet in width. The City's LCP ESHA policies require a 100-foot buffer around wetlands, and allow a reduced-width buffer only if it has been determined that a reduced-width buffer will adequately protect the resources of the wetlands. The permit application materials submitted to the City and the project record prepared by the City in their review of the proposed development did not fully address the adequacy of the reduced-width buffers to protect the wetlands ESHAs on or in proximity to the site being developed for the proposed retail commercial sales and service uses. Although a technical analysis accompanied the applicant's request for a reduced-width buffer around the wetlands at the site, the analysis failed to specifically identify: (1) the composition of the adjoining wetland ESHA particularly with respect to presence of any rare, threatened and/or endangered plant or animal species within the ESHA based upon established survey protocols; (2) the various resident and migratory animal species that actually inhabit or utilize the onsite and/or adjoining ESHAs; (3) the various resting, feeding,

breeding, and nesting requirements of these species to determine the habitat functions of the wetland; (4) the relative susceptibility of the habitat functions of the ESHA at the site to disturbance; (5) the transitional habitat needs of the area between the ESHA and the development; (6) the qualitative and quantitative impacts of development on the sensitive habitat resources; and (7) why the particular buffer widths established would be sufficient for reducing any significant adverse impacts to less than significant levels.

In addition, staff urge the Commission to find that the development was approved with a lack of adequate consultation with the California Department of Fish and Game regarding appropriate buffer requirements for the project. Although the originally submitted project designs were routed to the agency for comments, the project application overtime underwent a series of amendments to the physical layout of its proposed uses. These latter revisions, which included increases in proposed building coverage and intensification of vehicular activities (i.e., introduction of drive-through order/pick-up queues and off-street parking spaces) in closer proximity to wetland ESHAs on and adjacent to the site, were not transmitted to the agency for their review. In addition, later revisions to the wetland delineation, wherein the extent of these coastal resources were determined to extend further onto the project site than previously depicted on the earlier version of the report were not similarly provided to the agency for their consideration. Staff believe these changes in the project and resource area configurations represent critical information items necessary for ensuring the design and placement of site improvements is appropriate for prevent impacts to the onsite and adjoining wetland areas, and as input based on these materials were not solicited, a substantial issue is raised with respect to the approved revised project's consistency with the LCP's ESHA protection policies.

Staff also recommend that the Commission find that a substantial issue is raised with regard to the approved development's consistency with LCP requirements for incorporating informational signage with in the buffer areas. These signs are intended to provide constructive notice of the presence and fragility of environmentally sensitive areas for the purpose of preventing unknowing intrusions into the ESHA and to generally educating the public as to the importance of these natural resources. As such signage was neither included in the project proposal or required as part of its approval, impacts to the adjoining wetlands associated with human entry into these habitat areas or other incompatible uses such as littering, vegetation removal or waste disposal by parties unawares, could have been further reduced.

Staff further recommends that the Commission continue the *de novo* portion of the appeal hearing to a subsequent meeting because the Commission does not have sufficient information from the applicant to determine if the current project can be found consistent with the environmental protection policies of the certified LCP.

The Motion to adopt the Staff Recommendation of Substantial Issue is found on Page 5.

STAFF NOTES:

1. Appeal Process.

After certification of Local Coastal Programs (LCPs), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Section 30603 states that an action taken by a local government on a coastal development permit application may be appealed to the Commission for certain kinds of developments, including developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea or within one hundred feet of a wetland or stream or three hundred feet of the mean high tide line or inland extent of any beach or top of the seaward face of a coastal bluff, or those located in a sensitive coastal resource area.

Furthermore, developments approved by counties may be appealed if they are not designated the “principal permitted use” under the certified LCP. Finally, developments constituting major public works or major energy facilities may be appealed whether approved or denied by the city or county. The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program and, if development is located between the first public road and the sea¹, the public access and public recreation policies set forth in the Coastal Act.

The subject development is appealable to the Commission pursuant to both Section 30603(a)(1) and (2) of the Coastal Act because it is: (a) located within 100 feet of a wetland or stream; and (b) situated on a site that lies between the first public road and the sea.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that the appeal raises no substantial issue of conformity of the approved project with the certified LCP. Since the staff is recommending substantial issue, unless three Commissioners object, it is presumed that the appeal raises a substantial issue and the Commission may proceed to its *de novo* review.

¹ Per Section 13011 of the California Code of Regulations, the “first public road paralleling the sea” means that road nearest to the sea, as defined in Section 30115 of the Public Resources Code, which: (a) Is lawfully open to uninterrupted public use and is suitable for such use; (b) Is publicly maintained; (c) Is an improved, all-weather road open to motor vehicle traffic in at least one direction; (d) Is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and (e) Does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised.

The only persons qualified to testify before the Commission on the substantial issue question are the applicants, the appellant and persons who made their views known to the local government (or their representatives). Testimony from other persons regarding substantial issue must be submitted in writing.

Unless it is determined that there is no substantial issue, the Commission will proceed to the *de novo* portion of the appeal hearing and review the merits of the proposed project. This *de novo* review may occur at the same or subsequent meeting. If the Commission were to conduct a *de novo* hearing on the appeal, because the proposed development is located between the first public road and the sea, the applicable test for the Commission to consider would be whether the development is in conformity with the certified Local Coastal Program and with the public access and public recreation policies of the Coastal Act.

2. Filing of Appeal.

One appeal was filed by Commissioners Wan and Caldwell (see Exhibit No. 7). The appeal to the Commission was filed in a timely manner on May 5, 2006, within 10 working days of receipt by the Commission on April 21, 2006 of the City's Notice of Final Local Action.²

I. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE:

Pursuant to Section 30603(b) of the Coastal Act and as discussed below, the staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

MOTION:

I move that the Commission determine that Appeal No. A-1-EUR-06-028 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

STAFF RECOMMENDATION:

² Pursuant to 14 CCR §13110, the appeal period commenced on April 24, 2006, the next working day following the receipt of the City's *Notice of Final Local Action* on April 21, 2006, and ran for the 10-working day period (excluding weekends) from April 24, 2006 through May 5, 2006.

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-1-EUR-06-028 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 Plan and/or the public access and recreation policies of the Coastal Act.

II. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. APPELLANTS' CONTENTIONS

The Commission received an appeal from Commissioners Wan and Caldwell.

The appellants contend that the project as approved by the City does not conform with the LCP policies concerning the protection of wetland environmentally sensitive habitat areas, as the extent and types of wildlife utilization of these coastal resources was not established, the specific impacts associated with the approved retail commercial sales and service complex on wildlife was not identified, and the adequacy of the proposed reduced-width buffer to protect these resources was not adequately substantiated or reviewed as part of the permit approval process. Furthermore, the appellants contend that an issue is raised as to the consistency of the approved project with LCP provisions for interagency consultation and consideration of natural resource trustee agency comments. In addition, the appellants raise contentions alleging inconsistency of the local action with the City's LCP policies regarding the protection of urban wetlands through the posting of informational signage regarding the presence and sensitivity of these environmental resources.

The appellants' contentions are summarized below; the full text of the appeal is included in Exhibit No. 7.

1. Protection of Wetland Environmentally Sensitive Habitat Areas.

The appellants contend that the development as approved by the City is inconsistent with LCP policies requiring that development be sited and designed to avoid impacts to adjacent environmentally sensitive habitat areas (ESHAs). The LCP requires the use of perimeter buffer areas around wetland areas, within which development would be

precluded or restricted, as the primary tool to ensure the avoidance of significant adverse impacts. The LCP ESHA policies require a 100-foot buffer around wetlands, and allow a reduced-width buffer only if it has been determined that a reduced-width buffer will adequately protect the resources of the wetlands. The approved project would provide for a wetland buffer of ten feet in width.

The appellants assert that the adequacy of these reduced-width buffers was not sufficiently demonstrated, as the technical studies prepared for the project did not thoroughly address the efficacy of the approved buffers of less than 100-foot-widths to protect the wetlands on the site. Instead, emphasis was placed on: (1) the current degraded state of the ESHA; (2) the relatively reduced impacts the approved development would exert on wetland resource areas as compared to past uses at or near the project site; (3) the existence of other authorized development in the vicinity with similar or even smaller reduced buffers; and (4) the apparent resiliency to disturbance wildlife utilizing the adjoining ESHA have demonstrated in adapting to human activities and development occurring in the surrounding area. The appellants contend that this approach effectively deviates from the standards set forth in the LCP wherein new development must be sited and designed to avoid significant disruption of ESHA functions and instead substitutes the criterion that new development have no greater impacts or result in further degradation than past, inarguably more disruptive, land uses at a given site. The appellants assert that the City should have required further analysis to document the extent and significance of use of these wetlands by wildlife, including: (1) the types of habitat being used; (2) the degree to which the approved development would directly, indirectly, and cumulatively adversely impacted these uses based on the existing environmental setting and contemporary conditions; and (3) the sufficiency of the reduced-width buffers to reduce these impacts so that the habitat utilized by the wildlife would be protected from any significant disruptions and further degradation. As such, analysis was not fully undertaken, the appellants conclude that the project as approved by the City is inconsistent with LCP provisions for the protection of wetlands as the adequacy of the reduced-width buffers to reduce impacts of the development between commercial retail sales and service activity areas and structures, and on-site and adjacent wetland habitat areas has not been established.

2. Consultation with California Department of Fish and Game.

The appellants also contend that the project as approved is inconsistent with LUP policies regarding consultations with state natural resources trustee agencies. The appellant note that the City's land use plan directs that, in cases where there is a question regarding either the boundary, buffer requirements, location, or current status of an ESHA the City is to transmit specific environmental information to the California Department of Fish and Game for their review. Any comments and recommendations provided by the Department are to be then immediately sent to the applicant for his or her response. The City is required to render a decision concerning buffer requirements for the environmentally sensitive habitat area in question based on the substantial evidence in the record and adopt findings to support its actions. The appellants contend that while this procedure was undertaken for the original project configuration, no such similar

transmittals and consideration of comments were performed for subsequent revisions made to the project which included the introduction of new uses and activities in closer proximity to the wetland ESHA than proposed in the original project layout.

3. Requisite Urban Wetland Mitigation Measures.

The appellants also contend that specific requirements for the constructive noticing of the presence and environmental sensitivity of wetlands through the erection of attractively designed and strategically located informational signs should have been included as a requirement of the permit issued by the City. The appellants assert that because the City did not include a condition requiring such signage, avoidable impacts associated with unknowing human intrusion into to the adjoining environmentally sensitive wetland areas could have been further reduced through the increased understanding of the functions, benefits, fragility, and related need for conservation of wetlands such signage is intended to instill.

B. LOCAL GOVERNMENT ACTION

On July 29, 2004, the City of Eureka Community Development Department accepted for filing a completed coastal development permit application from Eureka Pacific, LLC, for the development of approximately 34,600 square-feet of building area and related site improvements for a commercial retail sales and service complex on an approximately 3.0-acre parcel located at the southwestern corner of Broadway (Highway 101) and Vigo Street in the City of Eureka in west-central Humboldt County (see Exhibit No. 5). The purpose of the proposed commercial complex is to provide facilities for retail store and restaurant uses for serving both transient visitor and resident needs. As restaurants are identified as a conditional use within Commercial Service (CS) zoning district in which the project site is located, Community Development Department staff determined that the development requires the issuance of both a use permit and a coastal development permit.

On May 20, 2005, the applicant submitted revised site and elevation view plans depicting a total of 49,674 square-feet of retail building area to be constructed in two phases, with the first phase entailing an aggregate 43,674-square-foot area comprised of one to three commercial buildings and outdoor yard storage space, situated toward the rear of the lot, with the second phase comprising construction of a detached 6,000 square-foot retail/restaurant structure along the parcel's Broadway frontage. The site plan showed the application of a ten-foot wide buffer outward from the wetlands, with the corner of one of the retail buildings extending up to the wall proposed to be erected along the upland extent of the buffer.

Following completion of the Community Development Department staff's review of the project, and the requisite preparation and circulation of environmental review documentation, City staff set the use permit for a hearing before the Planning Commission for July 11, 2005 and a hearing before the City Counsel on the coastal development permit for July 19, 2005. After a series of postponements, in early

September 2005, the applicants informed the City that they were again modifying the project application and requested further hearing continuances.

In late February 2006, the applicants further modified the project description and site maps, scaling the aggregate building/yard coverage area back to 37,750 square feet, to be developed all in one phase. In addition to reducing the sizes of the retail buildings, the proposed uses with the buildings were further clarified, particularly, the identification of a drug store within the "Retail 'A'" building, which includes provisions for a drive-through aisle situated between that structure and the barrier wall proposed for erection on the upland side of the ten-foot-wide buffer (see Exhibit No. 4).

On March 13, 2006, the City Planning Commission conditionally approved Conditional Use Permit No. C-04-007, attaching special conditions and a mitigation and monitoring program consisting of 31 measures to be taken to reduce the project's potentially significant adverse effects to less than significant levels. The record of action issued by the City for the use permit indicated that the City Council would take subsequent final action on related Coastal Development Permit No. CDP-04-009 at a separate later hearing.

On April 18, 2006, the Eureka City Council approved with conditions Coastal Development Permit No. CDP-04-009 for the subject development (see Exhibit No. 6). The Council attached four special conditions requiring that: (1) reciprocal access easements be recorded for each parcel where any vehicular entry/exit onto Broadway that cross property lines; (2) either merge the two existing parcels or record Notices of Lot Line Adjustment and Certificates of Subdivision Compliance for the new lot configuration with reciprocal access easements recorded on both parcels for parking and access; (3) the location and size of all parking, landscaping and loading areas be shown on a final site plan submitted to the Design Review Committee and be in compliance with Municipal Code standards; and (4) an Encroachment Permit from Caltrans be obtained for any work within the Broadway right-of-way. In addition, the City Council adopted a 29-point mitigation and monitoring program,³ setting project design and layout specifications including exterior lighting, the installation and maintenance of oil-water separator/clarifiers, emergency services ingress and egress, parking and loading areas, and wetland buffer fencing, and establishing protocols for the protection of any cultural resources that might be encountered during construction at the site.

The decision of the City Council regarding the conditional approval of the commercial service improvements was final. The City then issued a Notice of Final Local Action that was received by Commission staff on April 21, 2006. The appellants filed their appeals

³ With the addition of supplemental traffic analyses and in response to comments from the California Department of Transportation, two of the mitigation measures imposed on the conditional use permit were determined to be no longer necessary or infeasible to implement and were subsequently excised from the mitigation and monitoring program for the related coastal development permit.

to the Commission on May 5, 2006, within 10 working days after receipt by the Commission of the Notice of Final Local Action (see Exhibit No. 6).

C. SITE AND PROJECT DESCRIPTION

The project site consists of two parcels comprising a rectangularly shaped 3.0-acre area located southwest of the intersection of Vigo Street with Broadway (Highway 101) along the southern highway commercial services entrance to the City of Eureka (see Exhibit Nos.1-3). The property consists of a generally flat, cleared lot with thickets of hydrophytic riparian vegetation along its western margins.

The middle of the site is currently developed with a truck terminal structure with peripheral paved and gravel-covered areas, extending essentially over the entire property. These buildings and their surrounding areas were utilized by a variety of surface transportation related support uses, including re-fueling, grocery vending, and rest-period parking and/or storage of long haul tractor trailers.

Residual unfilled wetland areas in the form of vegetated drainage swales are situated along a roughly 360 lineal-foot run along the property's western and southwestern boundary lines. Plant cover in these areas is dominated by a canopy of willow species (*Salix* spp.), notably arroyo willow (*Salix lasiolepis*) intermixed with other tree species including red alder (*Alnus rubra*), poplar (*Populus* sp.) and a naturalized apple (*Malus* sp), with an attending sparse understory composed of Himalaya blackberry (*Rubus discolor*), California blackberry (*Rubus ursinus*), swordfern (*Polystichum munitum*), and horsetail (*Equisetum arvense*).

The forested wetlands along the western side of the property, with the exception of the approximately 3,000 square-foot area lying easterly of the short berm runs along north to south along the western side of the property, are hydrologically integrated with the approximately 20-acre freshwater and brackish wetlands complex comprising Maurer, Railroad and East (AKA: "Bayshore Mall Restoration Area 'B'") Marshes, situated west and southwest of the project site. Vegetation cover in these marsh areas is composed of primarily of a canopy of willow, with emergent wetland species including common cattail (*Typha latifolia*), slough sedge (*Carex obnupta*), Pacific silverweed (*Potentilla pacifica*), salmonberry (*Rubus spectabilis*) and creeping buttercup (*Ranunculus repens*) within clearings and as understory beneath the willows and alders. Several inches to approximately one foot of standing freshwater exist in the depressions within the marsh areas during the wetter seasons. Under the Cowardin classification system,⁴ this area is considered a blend of "palustrine-scrub-shrub-broadleaf-deciduous-seasonally-flooded" (PSS1C) and "palustrine-emergent-persistent-seasonally-flooded" (PEM1C) wetlands.

⁴ Refer to U.S. Fish and Wildlife Service - Office of Biological Services' Publication No. FWS/OBS-79/31 "Classification of Wetlands and Deepwater Habitats of the United States" (Lewis M. Cowardin, et al, USGPO December 1979) for a further discussion of the definition of the extent of wetland habitats.

Located across Vigo Street approximately 50 feet to the northwest of the project parcels lies another wetland area, the “Palco” or “Eureka” Marsh. This roughly 30-acre area comprises a mixture of brackish and saltwater marshes with direct and muted tidegate connections to Humboldt Bay. The vegetation in this area is fringed by a tree canopy composed of composed various willows, red alder, and scattered California wax-myrtle (*Myrica californica*). The interior clearings are vegetated predominantly by obligate hydrophytes, including pickleweed (*Salicornia virginica*), inland saltgrass (*Distichlis spicata*), reed canary grass (*Phalaris arundinacea*), and in some locales, extensive patches common reed (*Phragmites australis*), an exotic invasive species. This area is classified as a combination of “estuarine-intertidal-emergent-persistent-irregularly-flooded (E2EM1P) and estuarine-intertidal-unconsolidated-muddy-shore-regularly-flooded (E2US3N) wetlands (see Exhibit No. 3).

The project site is situated within the coastal zone and lies within the incorporated boundaries of the City of Eureka. The subject property lies completely within the City of Eureka’s certified permitting area. Thus, the development is subject to the policies and standards of the City of Eureka’s certified Local Coastal Program (LCP).

The site is designated in the City’s Land Use Plan as “Highway Service Commercial” (HSC), implemented through a “Service Commercial” (CS) zoning designation. The subject property is not within any viewpoint, view corridor, or highly scenic area as designated in the visual resources inventory of the LCP’s Land Use Plan. Due to the property’s location approximately ¼-mile inland from the inner shoreline of Humboldt Bay and the presence of surrounding public and private land development and natural vegetation screening, no public views across the property to and along the ocean and designated scenic areas exist.

The approved development consists of a commercial retail sales and service complex that would entail the construction of approximately 37,750 square-feet of building floor area. In addition to the drive-through drug store (18,000 sq.ft.) general retail (13,750 sq.ft.), and drive-through restaurant (6,000 sq.ft.) enumerated on the approved site plan, various other site improvements would include the paving of interior traffic lanes and 143 off-street vehicular parking and delivery loading facilities, the installation of an oil-water separator-based stormwater drainage collection, conveyance, and treatment system, and the construction of a six-foot-tall solid cinderblock fence along the outboard side of the approved ten-foot wide buffer around the wetlands along the west perimeter of the property. Development immediately adjacent to the approved reduced width buffer include the drive-through queue for the drug store and eight off-street parking spaces (see Exhibit No. 4).

The approved retail commercial use are considered under the CS zoning district standards as principal permitted uses, specifically as “drugstores” and/or one or several of a wide assortment of other retail stores, offices, service establishments, amusement establishments, and wholesale businesses offering commodities and services required by residents of the city and its surrounding market area. The proposed drive-through

restaurant is listed as a conditional use and was authorized by the City through the March 13, 2006 issuance of accompanying Conditional Use Permit No. C-04-007.

Domestic and/or process water supplies, and sewage disposal services would be provided to the facility from the City of Eureka's municipal water and wastewater systems.

D. SUBSTANTIAL ISSUE ANALYSIS

Section 30603(b)(1) of the Coastal Act states:

The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Title 14, Section 13115(b), California Code of Regulations.) In previous decisions on appeals, the Commission has been guided by the following factors:

- The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
- The extent and scope of the development as approved or denied by the local 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, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure Section 1094.5.

All three contentions raised in the appeals present potentially valid grounds for appeal in that they allege the approved project's inconsistency with policies of the certified LCP. These contentions allege that the approval of the project by the City is inconsistent with LCP provisions regarding the protection of wetlands ESHA.

In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that with respect to the allegations concerning the consistency of the project as approved with the provisions of the LCP regarding the protection of wetlands ESHA, the appeal raises a substantial issue with regard to the approved project's conformance with the certified City of Eureka LCP.

1. Allegations Raising Substantial Issue.

a. Protection of Wetlands ESHA

The appellants contend that the project record for the approved development does not include adequate analysis to substantiate that the approved reduced-width buffer, as depicted on the approved site plan, of ten feet in width around the upland periphery of the wetlands on the site would be adequate to protect the resources of the wetlands from the impacts associated with the retail commercial complex inconsistent with the policies and standards of the City of Eureka LCP. The appellants assert that as: (1) the environmentally sensitive resources on or surrounding the property that might be affected by the approved development were not thoroughly inventoried; (2) none of the potential impacts to the adjoining ESHA inherent to the subject development as approved were substantively evaluated within the context of the existing environmental setting; (3) the effectiveness of the reduced-width buffer with the inclusion of screening and/or landscaping mitigation measures was not substantiated; and (4) little consideration was given for opportunities for enhancing the adjoining wetlands ESHA as part of the subject approved development's wholesale redevelopment of the site, it has not been demonstrated that the development has been sited and designed to prevent impacts or degradation to wetland environmentally sensitive habitat areas, and to restore such habitat areas where feasible, as required by both the certified Land Use Plan (LUP) and the City's Coastal Zoning Regulations.

Applicable LCP Policies and Standards:

Policy 6.A.1 of the City of Eureka Land Use Plan states, in applicable part:

The City shall maintain, enhance, and, where feasible, restore valuable aquatic resources, with special protection given to areas and species of special biological or economic significance.

LUP Policy 6.A.3 states:

The City shall maintain and, where feasible, restore biological productivity and the quality of coastal waters, streams, wetlands, and estuaries appropriate to maintain optimum populations of aquatic organisms and for the protection of human health through, among other means, minimizing adverse effects of wastewater and stormwater discharges and entrainment, controlling the quantity and quality of runoff, preventing depletion of groundwater supplies and substantial interference with surface water flow, encouraging wastewater reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams. [Emphasis added.]

LUP Policy 6.A.6 states, in applicable part:

The City declares the following to be environmentally sensitive habitat areas within the Coastal Zone: ...

b. *Wetlands...* [Emphasis added.]

LUP Policy 6.A.7 directs that:

Within the Coastal Zone, the City shall ensure that environmentally sensitive habitat areas are protected against any significant disruption of their habitat values, and that only uses dependent on such resources be allowed within such areas. The City shall require that development in areas adjacent to environmentally sensitive habitat areas be sited and designed to prevent impacts which would significantly degrade such areas, and be compatible with the continuance of such habitat areas. [Emphasis added.]

LUP Policy 6.A.8 states:

Within the Coastal Zone, prior to the approval of a development, the City shall require that all development on lots or parcels designated NR (Natural Resources) on the Land Use Diagram or within 250 feet of such designation, or development potentially affecting an environmentally sensitive habitat area, shall be found to be in conformity with the applicable habitat protection policies of the General Plan. All development plans, drainage plans, and grading plans submitted as part of an application shall show the precise location of the habitat(s) potentially affected by the proposed project and the manner in which they will be protected, enhanced, or restored. [Emphases added; parentheses in original.]

Policy 6.A.19 of the City of Eureka Land Use Plan directs that:

The City shall require establishment of a buffer for permitted development adjacent to all environmentally sensitive areas. The minimum width of a buffer shall be 100 feet, unless the applicant for the development demonstrates on the basis of site specific information, the type and size of the proposed development, and/or proposed mitigation (such as the planting of vegetation) that will achieve the purpose(s) of the buffer, that a smaller buffer will protect the resources of the habitat area. As necessary to protect the environmentally sensitive area, the City may require a buffer greater than 100 feet. The buffer shall be measured from the edge of the environmentally sensitive area nearest the proposed development to the edge of the development nearest to the environmentally sensitive area. Maps and supplemental information submitted as part of the application shall be used to specifically define these boundaries. [Emphases added.]

LUP Policy 6.A.20 reads as follows:

To protect urban wetlands against physical intrusion, the City shall require that wetland buffer areas incorporate attractively designed and strategically located barriers and informational signs.

Section 156.052 of the City of Eureka's Coastal Zoning Code Regulations states, in applicable part:

...

(C) *Environmentally sensitive habitat areas.*

(1) *Environmentally sensitive habitat areas within the city's coastal zone shall include:*

(a) *Rivers, creeks, sloughs, gulches and associated riparian habitats, including Eureka Slough, Fay Slough, Cut-Off Slough, Freshwater Slough, Cooper Slough, Second Sloughs, Third Slough, and Elk River.*

(b) *Wetlands*

(c) *Indian Island, Daby Island, and Woodley Island wildlife area.*

(d) *Other habitat areas, such as rookeries, and rare or endangered species on state or federal lists.*

(e) *Grazed or farmed wetlands.*

(2) *These areas are generally portrayed on the resources maps, where they are designated as wetlands or other natural resources.*

(D) *Protection of environmentally sensitive habitat areas. Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources, including restoration and enhancement projects, shall be allowed within such areas. Development in areas adjacent to*

environmentally sensitive habitat areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

(E) Development in or near natural resource areas. Prior to the approval of a development permit, all developments on lots or parcels shown on the land use plan and/or resource maps with a natural resource designation or within 250 feet of such designation, or development affecting an environmentally sensitive habitat area, shall be found to be in conformity with the applicable habitat protection policies of the Local Coastal Program. All development plans and grading plans shall show the precise location of the habitat(s) potentially affected by the proposed project and the manner in which they will be protected, enhanced, or restored. Projects which could adversely impact an environmentally sensitive habitat area may be subject to a site inspection by a qualified biologist to be selected jointly by the city and the applicant. Where mitigation, restoration, or enhancement activities are required to be performed pursuant to other applicable portions of this Local Coastal Program, they shall be required to be performed on city-owned lands on the Elk River Spit or on other available and suitable mitigation, restoration, or enhancement sites...

(O) Buffers. A buffer shall be established for permitted development adjacent to all environmentally sensitive areas. The width of a buffer shall be 100 feet, unless the applicant for the development demonstrates on the basis of information, the type and size of the proposed development, and/or proposed mitigation (such as planting of vegetation) that will achieve the purposes of the buffer, that a smaller buffer will protect the resources of the habitat area. For a wetland, the buffer should be measured from the landward edge of the wetland. For a stream or river, the buffer should be measured landward from the landward edge of riparian vegetation or from the top edge of the bank (such as, in channelized streams). Maps and supplemental information submitted as part of the application should be used to specifically determine these boundaries.

(P) Barriers. To protect wetlands against physical intrusion, wetland buffer areas shall incorporate attractively designed and strategically located barriers and informational signs... [Emphases added.]

Section 156.056(E) of the City of Eureka's Coastal Zoning Code Regulations states, in applicable part:

Precedence of natural resources. Development type and density shall be that specified by the land use categories and designations in the land use plan map. However, natural resource designations and policies shall take

precedence in all cases, except as otherwise provided in this Local Coastal Program, consistent with applicable policies of the Coastal Act...
[Emphasis added.]

Section 156.107 of the City of Eureka's Coastal Zoning Code Regulations directs that:

A coastal development permit shall be approved only upon making the finding that the proposed development conforms to the policies of the certified local coastal program.

Discussion:

As cited above, the LUP's Natural Resources chapter and the City's coastal zoning regulations contain policies and standards intended to ensure that environmentally sensitive habitat areas (ESHAs) are protected from development. Establishing appropriately sized buffer areas around the periphery of ESHAs, in which development is either outright prohibited or considerably constrained, represents one of the most effective resource management tools available for protecting these coastal resources. Buffers provide separation from development and environmentally sensitive habitat areas (ESHAs) to minimize disturbance to plants and animals inhabiting an ESHA and to protect the biologic, geologic, hydrologic, and aesthetic integrity of the area. Buffers are typically intended to create a spatial separation between potentially disruptive activity typically associated with development such as noise, lighting, and human activity which can disrupt feeding, nesting, and behavior patterns of wildlife. Buffer areas also provide transitional habitat between development and environmentally sensitive habitat areas. Additionally, buffers are often required to provide a vegetated area to capture and treat drainage and stormwater runoff from development to minimize the amount of pollutants potentially entering environmentally sensitive habitat areas and receiving waters. Where compatible recreational uses are concurrently provided within the ESHA, buffers help shield the conservation area from human activities in adjoining areas that could detract from enjoyment of the area for hiking, nature study, and other passive, non-consumptive recreational pursuits.

LUP Policies 6.A.7 and 6.A.19, and as implemented through CZR Sections 156.052(D) and (O), require that development be sited and designed to prevent impacts and degradation and that a 100-foot-wide buffer be established between the edge of the wetlands and any proposed development. Provisions are also included to allow for a reduced buffer width subject to the City making specific findings as to the adequacy of the reduced buffer to protect the wetland areas, taking into account the type and size of the proposed development, and/or other proposed mitigation measures (e.g., the planting of vegetation) that will achieve the purposes of the buffer. Furthermore, as set forth in LUP Policy 6.A.8 and CZR Section 156.052(E), development on lots or parcels located in or within 250 feet of Natural Resources zoned lands, all developments or development affecting an environmentally sensitive habitat area, must be found to be in conformity with the applicable habitat protection policies of the Local Coastal Program. Additionally, all development plans and grading plans shall show the precise location of

the habitat(s) potentially affected by the proposed project and the manner in which they will be protected, enhanced, or restored.

Wetlands Delineation

The project site contains wetlands along its western portions. In addition, the site is adjacent to wetlands along its western and northwestern boundaries. These onsite and offsite areas consist of land exhibiting a prevalence of hydrophytic vegetation, near-surface hydrology, and/or hydric soils. The wetland areas immediately along the western side of the property and extending to some unspecified distance from the subject project site were the subject of a series of wetland delineation/ biological surveys (Winzler & Kelly Consulting Engineers, July 2004, revised July 2005 and January 2006, and further supplemented April 2006). These reports were prepared for the purpose of establishing the location and extent of the wetlands and determining appropriate buffers around these areas. The location and extent of the wetlands along the project property's western boundary were demarcated pursuant to established delineation methodology and were illustrated on site maps and described within the delineation report incorporated as a technical study within the permit application submitted for the project (see Exhibit No. 8).

Assessment of Habitat Conditions and Protective Adequacy of Proposed Buffer

As regards assessment of relevant biological resources within the adjacent ESHA, the wetland delineation / biological survey prepared for the project presents a limited evaluation of site conditions: With the exception of identifying two bird species known to inhabit Maurer Marsh as being of special concern to the California Department of Fish and Game, including a description of the predominant hydrophytes encountered during the delineation field study, and stating that no rare, endangered, or threatened plant or animal species were either observed or had been documented as nesting in the adjoining areas, the majority of information regarding the habitat characteristics of the wetland area was relegated to vegetated cover entries on the wetland transect data sheets and summary lists of avian and plant species found in the adjoining "riparian woodland."

No further evaluation was made of habitat utilization of the area by other fauna other than birds, nor was any discussion provided as to the presence and significance of other emergent or aquatic habitats further within Maurer Marsh beyond the observed riparian vegetation at the project site margins.⁵ Additionally, although the southeastern margins

⁵ The Commission notes that in correspondence received from the applicant's consultant, a distinction is made between the outward extent of delineated wetlands on the project site where hydrophytic vegetation predominates and locations further within Maurer Marsh off of the site where standing water conditions are encountered (see Exhibit No. 12, page 26). These characteristics are ostensibly detailed for the purpose of asserting that the ESHA actually commences at a location more further removed from the development site and that, in actuality, a 30- to 40-foot-wide exists between the ESHA and the site improvements rather than the ten-foot distance disclosed within the preceding wetland delineation / biological survey reports. The Commission observes that is information was not previously contained within the project's record at the time of the City's approval of

of Palco Marsh are situated at a distance of approximately 50 feet cater-corner across Vigo Street from the northwestern corner of the project site, no evaluation was provided of the potential effects the project might have on this Natural Resources-zoned property or how the development would be in conformity with the habitat protection policies of the General Plan, as mandated by CZR Section 156.052(E).

Thus, with the exception of comparing and contrasting in general terms the impacts that would result from the approved development with those from the inarguably more resource intensive past use of the site as a truck terminal and noting the conspicuous damage inflicted within the adjoining marsh from homeless encampments, the biological survey provided little coverage of the particular disturbances the project itself would exert on nearby environmentally sensitive areas. Notwithstanding the lack of information regarding the resources present within the adjacent wetland area that potentially could be adversely affected by the development, the biological assessment summarily provided the following recommendations with respect to an appropriate buffer width and inclusion of related mitigative features with in the project's design:

It is recommended that a 10 foot setback be established between the mapped wetlands and the development. Based on the conditions discussed below it is concluded that a 10 foot setback is adequate to protect the wetland resource.

Any new construction should restrict the size and number of west-facing windows in any structure adjacent to the riparian habitat. Additionally, night lighting should be shielded or angled to directly illuminate the paved area and not the riparian habitat. A cinder block wall shall be installed along the westerly edge of development to minimize the impacts for both window reflection and on-site lighting. In addition, the wall will isolate the riparian habitat from the development. The cinder block wall can be replaced, in a short section, with a 3-foot high soil berm landscaped with dense, evergreen trees, such as wax myrtle (*Myrica californica*) or an equal. The planting of evergreens shall be done as to provide a solid vegetative screen when the trees mature (10'-15' on center).

Based upon the recommendations of the biological assessment, the City approved the reduced-width buffer, attaching as permit conditions Mitigation Measure Nos. I-2, IV-1, IV-2, IV-3, and VIII-1 from the mitigated negative declaration which read as follows:

the development. Moreover, the significance of this information is somewhat moot, given that per LUP Policy 6.A.6 and Coastal Zoning Regulations Section 156.052(C)(1)(b), all wetlands, regardless of their surface hydrologic characteristics, are defined as ESHA within the City's LCP.

Mitigation Measure No. I-2: The applicant shall construct a 6-foot tall cinder block wall from the north edge of the lot the entire width to the south edge on the outside edge of the ten-foot buffer area.

Mitigation Measure No. IV-1: No west facing windows shall be allowed in the structure(s) adjacent to the riparian habitat area.

Mitigation Measure No. IV-2: There shall be no exterior lighting on or along the west side of the building(s) or outdoor storage area facing the riparian habitat area and no exterior lighting on or along the west end of the south wall of the building(s) adjacent to the riparian habitat area. The only exception shall be lighting specifically needed for the loading dock.

Mitigation Measure IV-3: The proposed loading dock adjacent to the riparian habitat shall have a roof and be enclosed on three sides.

Mitigation Measure VIII-1: The applicant shall submit a grading and drainage plan that shall show that all runoff from parking areas run through an oil/water clarifier prior to discharge to the public storm drain system or the adjacent marsh. The applicant will be required to enter into a recorded Hold Harmless and Maintenance Agreement with the City of Eureka for runoff discharge.

As further substantiation of the protective adequacy of the approved ten-foot buffer, the background information within the City's findings stress the past 50+-year use of the site as a truck stop/terminal with no buffers between the developed portions of the property and the adjoining ESHA and cites City permits previously issued in the vicinity of the project site in 1994, 1998 and 2001, authorizing development of highway commercial service uses (i.e., drive-through coffee kiosk, drive-through restaurant, and fueling station) and a government administrative center (Six Rivers National Forest's Supervisor's Office) in locations as close or closer to the wetlands within Maurer Marsh as that authorized for the approved development. In addition, the City's findings and the applicant in commenting on the appeal repeatedly highlight the on-going and pervasive impacts to coastal wetland resources due to vegetation removal, littering, and other waste dumping associated with homeless encampments within Maurer Marsh, concluding that these activities far outweigh the habitat degrading impacts that would result from redevelopment of the site with the approved project. Though the Commission acknowledges these past and present resource impacts, the question of whether the appeal raises a substantial issue relates to whether the subject development project itself as approved by the City has been designed and sited to prevent impacts to environmentally sensitive areas inherent to that development consistent with all applicable LCP policies and standards, independent of the relative intensity of whatever past land uses may have been conducted at the site or may be occurring within the vicinity.

Accordingly, despite a lack of a thorough inventory of the resources potentially affected by the development, quantification of the particular impacts of the proposed development

on adjoining wetlands, or a substantive evaluation of the effectiveness of the proposed reduced-width buffer with the inclusion of the proposed wall barrier and/or landscape screening to protect the adjacent habitat areas, the City authorized a reduced-width buffer of ten feet in width around the edge of the onsite wetlands on the western side and the project site. The City findings indicate that, while acknowledging the high ecological value of the western wetland areas for providing substantial wildlife habitat, particular for migratory and resident bird species, the reduced-width buffer would be sufficient because, among other reasons, the subject wetlands: (a) contains no known threatened or endangered species; (b) have little hydrologic connectivity to the project site; (c) would be subjected to no greater degree of impacts than those previously generated by the recently discontinued former truck terminal uses at the project site⁶; (d) is located in a setting comparable to other development projects in the vicinity authorized with similar reduced-width buffers for which no evidence of significant degradation of their adjacent wetlands has been documented⁷; and (e) would be enhanced by the placement of solid barrier fencing along the outboard side of the proposed buffer, the installation of drainage improvements including an oil-water separator, and other limitations on exterior site lighting and building design.

The factual basis used by the City's findings for conditional approval of the project was the biological assessment prepared for the development. These documents contain the wetlands delineation report and related analyses regarding the rationale for the reduced wetlands buffers. However, it is not apparent that this analysis inventoried the wildlife

⁶ The appeal states that the former truck terminal has been closed for "several years." Based upon information contained within the applicant's correspondence, this characterization is seemingly erroneous as the former lessee apparently continued truck stop operations until the site lease expired in April 2005 (see Exhibit No. 12, page 9).

⁷ The reduced-width ESHA buffers that have been authorized on other development sites along the Broadway/Highway 101 corridor are reflective of a "string-line" approach, whereby adjoining, possibly legal nonconforming structures, flanking the subject site have already been constructed at locations very close Maurer Marsh, and the development in question at a similar setback would result in no further direct, indirect, or cumulative significant adverse impacts than are already exerted by these neighboring developments. This situation is particularly applicable to the development of the Broadway Chevron, Gold Rush Coffeeshop, and Taco Bell developments cited by the applicant's consultant and the City in partial justification for authorizing the approved development's ten-foot-wide, reduced-width buffer. However, the appropriateness of applying the string-line setback method to the appealed development project is dubious as the subject site is much larger and abuts a much larger portion of Maurer Marsh than the other developments cited. In addition, many of the more intensive uses at the other referenced development sites are located at greater distances from the marsh than those at the approved development. Therefore, it is unlikely that any significant adverse impacts these nearby developments may have on the adjoining wetlands extend to major portions of ESHA as would those at the appealed project site. Consequently, it is doubtful that the adverse impacts that may be originating on properties adjoining the appealed project site would mask or subsume the impacts originating from the appealed development to a degree where imposition of an buffer matching that on the neighboring properties would be appropriate for protecting the resources within the adjoining marsh.

species that use the portion of the Maurer/Palco/Railroad/East Marshes beyond the project parcels' western boundary environs or within neighboring Palco Marsh to the northwest, how the various enumerated species utilize the habitat (i.e., feeding, roosting, nesting, etc.), and how the particular disturbances that would result from the project would affect the functions provided by the sensitive habitat. While the biological report focuses on several generic categories of impacts to wildlife in general, the biological evaluation does not provide an overall assessment of the specific functions and resources in the adjoining wetland areas. The biological analysis failed to identify: (1) the various resident and migratory species that inhabit or utilize the ESHA; (2) the various resting, feeding, breeding, and nesting requirements of these species; (3) the relative susceptibility of the species engaging in these activities at the site to disturbance; and (4) the transitional habitat needs of these species between the ESHA and the development. For example, the biological report did not include any specific information regarding the current level of use of the ESHA by various species of wildlife other than by birds on or beyond the project parcels' immediate perimeter and how these habitat uses of the ESHA would be expected to change as a result of the operation of the constructed development.

Furthermore, there is no quantification of what the anticipated noise and lighting levels and other human disturbance associated with the operation of the development would be and how the width of the buffer between the ESHA and the development would affect the habitat functions of the ESHA. For example, with regard to noise and lighting impacts associated the maneuvering, loading, unloading, and idling of transport trucks at the site, the off-loading dock has been required to be enclosed. The implication is that with this restriction in place noise impacts associated with transport vehicular activities at the site would be reduced to less than significant levels. However, the project analysis contains no information as to the intensity of noise and lighting that would typically be generated at the designated loading area locations and the degree of attenuation that would be afforded by the imposed loading area setbacks. The biological assessment instead emphasizes the degraded nature of the project site from past development activities, notes the history and presence of wetland mitigation facilities near the site, and concludes that with the addition of certain specified mitigation measures (i.e., fencing, drainage improvements, loading area restrictions), additional impacts associated with the project would not result in adverse impacts to wildlife resources.

Additionally, while the approved project with the installation of some of the identified mitigation measures would be an improvement relative to existing site conditions, the information in the record does not demonstrate how the fencing, drainage improvements, and other site restrictions would achieve the purpose(s) of the buffer to effectively protect the resources of the habitat area as required by LUP Policy 6.A.19 and CZR Section 156.052(O). For example, while the site paving and installation of an oil-water separator/clarifier facility, may inarguably intercept and reduce the amount of stormwater runoff-entrained contaminants entering the adjoining wetlands, no information was provided as to the effects, if any, site development would have on groundwater resources (e.g., effects on recharge and the alteration of sub-surface hydrology from impervious surfaces and foundations). Until this information is known, it cannot be demonstrated

that a buffer width less than the default 100 feet identified in the LCP would be adequate to protect the various species and habitat values of onsite and adjacent ESHAs.

Implicit throughout the City's adopted findings is the reasoning that, because of the current degraded conditions within Maurer Marsh, the historic and previously permitted uses within or adjacent to these wetlands ESHA, and as the existing development pattern on and in the general vicinity of the project site involve land uses and activities far more intensive than would occur with the approved development, the City need not comprehensively inventory the resources potentially affected by the development or factually substantiate what specific buffer width would adequately protect the ESHA from the discrete impacts of the subject development project. The City effectively concluded that it need only insure that no greater impacts or further degradation to the wetlands ESHA result from the project than historically existed at the site and/or were permitted to occur at other development sites along the Broadway side of Maurer Marsh.

The approved project would completely remove the existing site improvements. Accordingly, the construction of the authorized commercial service facilities represents new development that is subject to the policies of the LCP, including requirements that buffers of adequate width be established between delineated ESHA and site improvements. The fact that the prior truck terminal use was established decades before the LCP was certified, was built very close to the marsh, and may have had significant adverse impacts on the resources within the marsh does not obviate the ESHA protection and buffer requirements that now apply to new development. LUP Policy 6.a.19 and CZR Section 156.052(O) require that a minimum 100-foot-wide buffer be provided, unless it can be demonstrated that a smaller buffer would be adequate to protect the resources of the wetland from the adverse impacts associated with the proposed new development. These LCP standards do not provide for approval of narrower buffers simply because the new development uses would be less impacting than those previously undertaken at a given site.

Thus, the degree of factual and legal support for the City's decision is not sufficient to demonstrate that the development as approved is consistent with the ESHA and wetland protections policies of the LCP. In addition, given the significance of Maurer Marsh with respect to the significant biological habitat resources that could be affected by the subject development, the issue of the approved project's conformance with the buffer policies of the LCP is substantial. Furthermore, as Sections 30233 and 30240 of the Coastal Act require that wetlands of the coastal zone be protected from the impacts of development and the cumulative impact of the loss of wetlands and wetland habitat over time throughout the coastal zone has been significant, the appeal raises issues of statewide significance rather than just a local issue. Therefore, given this apparent deviation from the intended application of the LUP policies and coastal zoning standards mandating that, among other requirements, new development be sited and designed to prevent the intrinsic direct, indirect, and cumulative impacts associated with a given development such that biological productivity and habitat values within adjacent ESHAs are protected and enhanced, and that any ESHA buffer width less than the default 100-foot-width be demonstrated as adequate to protect the various species and habitat values of the ESHA at

the site, the Commission finds that the approved project raises a substantial issue of conformance with the ESHA provisions of the certified LCP, including the provisions of the LUP's Natural Resources Policies 6.A.1, 6.A.3, 6.A.7, and 6.A.19, and Section 156.052(O) of the Coastal Zoning Regulations.

The Commission also finds that, given its location in proximity to Natural Resources zoned lands within Maurer and Palco Marshes, the project as approved by the City raises a substantial issue of conformance with LUP Policy 6.A.8 and CZR Section 156.052(E), wherein development potentially affecting such resource areas is to be shown in conformity with the applicable habitat protection policies of the General Plan.

Feasible Restoration Opportunities

In addition to contending that the factual evidence substantiating the adequacy of the reduced width buffer is inadequate, the appellants also raise the contention that no consideration was given as to what if any opportunities might exist for restoring Maurer Marsh as part of the approved development project as directed by the LCP. A review of the project record indicates that no project alternatives, including reconfigured or scaled-down site development layouts that would fulfill most of the applicant's project objectives while providing for partial restoration or enhanced protection of Maurer Marsh, through such actions as the establishment of larger buffers than currently exist at the project site, were considered during the City's review of the development. Alternately, options for offsite or in-lieu restoration efforts, such as enhancing the buffers or wetland areas elsewhere within the Maurer/Palco/Railroad/East Marshes complex, were not explored.

In their correspondence regarding the appeal contentions, the applicant relates the numerous health and safety issues that had to be resolved to the City's and other reviewing agency's satisfaction regarding vehicular circulation associated with the state highway the project site abuts (see Exhibit No. 12, page 3). The applicant contends that in satisfying these requirements, constraints of the location and layout of the project improvements rendered infeasible the possibility of incorporating a wider wetland buffer at the rear of the property. While the Commission acknowledges the indisputable regulatory complications the applicant must address in designing a site plan and the relative betterment that would result from redevelopment of a vacant commercial-industrial site, these regulatory limitations and derived benefits do not alter the underlying obligation that any development approved for the site be shown to be in conformity with all relevant provisions of the LCP, including requirements that the development be designed and sited to prevent impacts to ESHAs and, where feasible, restored. The Commission also observes that no LCP provision exists which authorizes maximized development of a given site in variance to these resources protections notwithstanding whatever benefits may result from the development.

Thus, considering the significance of the affected resource, the scope and extent of the development approved by the local government comprising a full redevelopment of the project site, and the statewide significance of continued and/or further degradation to

California's diminished wetland resources, a substantial issue is raised with regard to the approved development's consistency with LUP Policy 6.A.1 and CZR Sections 156.052(E) and 156.056(E), which require that the City, where feasible, restore ESHAs, provide for any required mitigation, enhancement, or restoration work to be performed on City-owned sites, and that precedence be given to natural resources in the authorization of development types and densities, respectively.

b. Consultation with California Department of Fish and Game

The appellants also assert that consultations with the California Department of Fish and Game (CDFG) and responses to that agency's comments and recommendations were neither conducted or prepared for the approved development as required by the LCP. The appellants note that while an earlier project configuration project configuration was transmitted to the CDFG in August 2004 for their review, and responded to by the applicant's consultant in February 2005, no such iterative review was afforded for the revised project site plan approved by the City in April 2006. As the project ultimately approved by the City differed markedly in the layout of proposed uses in areas immediately adjoining the wetland ESHAs, (e.g., intensified vehicular circulation, off-street parking, and loading area activities), the appellants contend that consultations that might have led to identification of appropriate mitigation measures for reducing the impacts of these heretofore unconsidered potential impacts were not undertaken as required by the LCP.

Applicable LCP Policies and Standards:

In establishing criteria and procedures for addressing uncertainties over the extent and/or sensitivity of a particular ESHA, LUP Policy 6.A.24 directs that:

Within the Coastal Zone, where there is a question regarding the boundary, buffer requirements, location, or current status of an environmentally sensitive area identified pursuant to the policies of this General Plan, the City shall require the applicant to provide the City with the following:

- a. Base map delineating topographic lines, adjacent roads, location of dikes, levees, of flood control channels and tide gates, as applicable;*
- b. Vegetation map, including identification of species that may indicate the existence or non-existence of the sensitive environmental habitat area;*
- c. Soils map delineating hydric and non-hydric soils; and*
- d. Census of animal species that may indicate the existence or non-existence of the sensitive environmental habitat area.*

The City shall transmit the information provided by the applicant pursuant to this policy to the Department of Fish and Game for review and comment. Any comments and recommendations provided by the Department shall be immediately sent to the applicant for his or her

response. The City shall make its decision concerning the boundary, location, or current status of the environmentally sensitive habitat area in question based on the substantial evidence in the record and shall adopt findings to support its actions. [Emphasis added.]

Discussion:

On August 31, 2004, the California Department of Fish and Game issued a comment letter reflecting their review of the Initial Checklist environmental document prepared for the subject development (see Exhibit No. 9, pages 8-10). At the time of CDFG's review, the proposed project entailed the development of 34,600 square-feet of commercial building coverage, arranged in three building envelopes. This project layout depicted four trash receptacle enclosures and a loading service area situated at the rear of the site adjoining a proposed ten-foot-wide wetland buffer (see Exhibit No. 4). This project configuration did not include the drugstore drive-through aisle or the twelve off-street parking spaces ultimately approved by the City in April 2006 (see Exhibit Nos. 3 and 5). Additionally, the subject circulated environmental document included July 2004 the wetland delineation and ESHA buffer assessment (see Exhibit No. 12).

With regard to the habitat analysis provided in the environmental document, the CDFG staff observed:

The "Biological Resources" section of the checklist states "The front half of the parcel is developed and no habitat or plant community of biological significance was found in that location. The western edge of the proposed project site is comprised of an environmentally sensitive habitat area (ESHA) comprised of riparian woodland associated with the Maurer Freshwater Marsh.' The document does not state whether any biological resources are present in the back half of the parcel other than what is present along the western edge. This information should be included in the document.

With regard to appropriate buffers and mitigation measures for shielding the adjoining wetlands from the impacts associated with the then-proposed development, CDFG staff recommended the following:

The 'Wetland Delineation/Biological Survey' included with the checklist states that a wetland area is present on the project site and 'maintains a boundary roughly parallel to the riparian edge on the west section of the subject acreage.' It recommends that this wetland be protected through the establishment of a 10-foot setback between the mapped wetlands and the development by limiting the west-facing windows of the structures, through the construction of a cinder block wall, or a 3-foot high soil berm landscaped with dense evergreen trees. According to the document, the Eureka Local Coastal Plan requires protection of wetlands and sensitive habitats through the establishment of a 100-foot buffer 'unless the

applicant for the development demonstrates on the basis of site specific and/or proposed mitigation (such as planting of vegetation) That will achieve the purposes of the buffer, that a smaller buffer will protect the resources of the habitat.’

The DFG recommends a minimum buffer distance of 50 feet for wetlands of 1.0 acre or less, a 75-foot buffer for wetlands greater than 1.0 acre up to 5.0 acres in size, and a 100-foot buffer for wetlands greater than 5.0 acres in size. These buffer distances may be reduced by 50% if appropriate native trees and shrubs are planted as a vegetative screen within the buffer area or up to 50% of the buffer area may be averaged around the wetland as long as a minimum of 50% of the original buffer distance is maintained.

While the applicant has proposed a smaller buffer, the document does not describe how the proposed mitigation measures will provide adequate protection for the wetland and wetland species. The document should include specific information regarding the number of west-facing windows which will be allowed and how the light from these windows way affect wildlife species using the adjacent wetland. Additional information is also required regarding the project's potential to:

- increase noise in the vicinity of the wetland,
- change the site's hydrology and drainage into the wetland,
- improve human access to the wetland which may result in dumping of materials or spilling of toxic substances;
- allow fertilizers, pesticides, and petroleum products to drain into the wetland.

On February 15, 2006, the applicant’s consultant submitted a response to the CDFG comments to the City’s Community Development Department (see Exhibit No. 9). With regard to CDFG’s request for further information on wetland resources beyond the immediate western periphery of the project site, the consultant emphasized the woodland riparian character of the approximately 5,300 square feet of wetlands along the property’s western margin and provided only a very generalized description of other portions of Maurer/Palco/Railroad/East Marshes further to the west and northwest.

With respect to the addition information requested by CDFG, the consultant observed that drainage improvements would alter the current sheet flow pattern of stormwater runoff into the western wetland area and instead would be conveyed into an oil-water separator treatment vault. The consultant noted that this site amenity would inevitably improve water quality within the adjoining marsh by intercepting and preventing further releases of stormwater-entrained hazardous materials into the ESHA.

Regarding the number of window openings on the westerly sides of the buildings, increased noise, alterations to hydrology, and potential releases of hazardous materials in stormwater runoff, the applicant’s consultant stated that while west-facing windows

would be prohibited within the building proposed for placement ten feet from the wetland-upland boundary, no such restriction would be placed upon the other proposed building proposed for erection approximately 50 feet from the outer extent of the wetlands. The number of windows proposed for this latter building was not disclosed.

As relates to potential noise impacts from the proposed development, the consultant offered the observation that past truck terminal uses at the site in the absence of any sound barrier far exceeded what would be emitted from the proposed retail commercial sales and services activities and that the six-foot-high cinderblock fence proposed for erection ten feet from outboard from the wetland boundary would sufficiently shield the adjoining wetlands from noise disturbances. No specific quantitative information was provided regarding the noise levels that would be anticipated from the development site or the degree of attenuation the proposed barrier would afford, nor was any specific response given to the CDFG's recommendation for a 50-foot-wide buffer and why or why not such a standard would be appropriate for the development and/or its setting.

Aside from the consultant's responses for the initial proposed project layout, the local agency records does not contain any further correspondence with the CDFG regarding subsequent changes to the proposed development and the continued adequacy of the proposed reduced buffer width to protect the adjoining ESHA. As discussed in Local Government Action Findings Section II.B above, the applicant subsequently revised the proposed development site plan in late 2005 and again in February 2006 to the configuration ultimately approved by the City in April 2006. Notwithstanding the substantial changes to the project, including a 3,150 square-foot increase in building coverage compared to that proposed in mid-2004, and inclusion of a drive-through aisle and twelve parking spaces along the rear side of the site in the vicinity of the wetlands, there is no indication that these project revisions were submitted to the CDFG for additional comments. Moreover, since its initial preparation in July 2004, a series of revisions and augmentations were made to the wetlands delineation and ESHA buffer assessment (see Exhibit No. 8). Of note within these documents is a January 2006 revision to the wetland-upland boundary following from field consultations with U.S. Army Corps of Engineers staff, wherein approximately 1,150 square-feet of additional wetlands are depicted on the site map, extending roughly 20 feet further onto the property at its northwestern corner than shown on the July 2004 delineation map provided to the CDFG.

In correspondence regarding the filed appeal, the applicant asserts that the scope of LUP Policy 6.A.24 is limited solely to instances where the boundary, location, or status of a given ESHA is in question, and does not extend to the issue of subject of buffer requirements for the ESHA (see Exhibit No. 12, page 6). However, the Commission notes that, as cited above and as appears on page 6-5 of Section 6 of the City of Eureka's currently certified Land Use Plan, a careful reading of Policy 6.A.24 will reveal that the words "buffer requirements" are specifically included among the ESHA issues for which consultation with the CDFG is to be undertaken.

Thus, the degree of factual and legal support for the City's decision is not sufficient to demonstrate that the development configuration ultimately approved by the City is consistent with the ESHA and wetland protections policies of the LCP, particularly with respect to consideration of comments and recommendations from the California Department of Fish and Game. Therefore, the Commission finds that the approved project raises a substantial issue of conformance with the ESHA provisions of the certified LCP, specifically the provisions of Natural Resources Policy 6.A.24 requiring that in cases where the extent or sensitivity of an ESHA is in question for a given development proposal that the City transmit information regarding the environmental resources to the California Department of Fish and Game for review and comments, and to respond to any such comments provided by the CDFG.

c. Inclusion of Information Signage

Finally, the appellants note that, contrary to the City's coastal zoning regulations, no informational signage disclosing the presences of wetlands and/or posting allowances, if any, for entry into or permissible uses therein, was either proposed for or required in the City's approval of the subject development. With such constructive noticing of the environmental sensitivity of the habitat area, unknowingly damaging intrusions (i.e., littering, entry, camping, vegetation removal) into Maurer/Palco Marshes might have been reduced consistent with directives set forth in the LCP.

Applicable LCP Policies and Standards:

Section 156.052(P) of the City of Eureka's Coastal Zoning Code Regulations states:

...

Barriers. To protect wetlands against physical intrusion, wetland buffer areas shall incorporate attractively designed and strategically located barriers and informational signs. [Emphasis added.]

Discussion:

The posting of educational signage declaring the presence of environmentally sensitive areas such as wetlands and riparian corridors and information relating to their biogeohydrologic functions has proved to be an effective management tool in reducing impacts to aquatic habitat due to the lack of understanding many members of the general public may possess regarding the fragility and importance of these resource areas.⁸ As the applicant's consultant notes in several references to the conditions within Maurer Marsh near the project site, these wetland areas have been subjected to trash dumping,

⁸ See *Invisibility of Stream/Wetland Buffers: Can Their Integrity be Maintained?* in Watershed Protection Techniques, Vol. 1(1): pp. 19-21, Center for Watershed Protection, ©2000.

vegetation removal, illegal camping, and the release of hazardous materials entrained in stormwater runoff for adjoining commercial-industrial areas. These activities have resulted in cumulative impacts to the functional capacity of the Maurer/Palco/Railroad/East Marsh wetlands complex partially contributing in their current degraded state. Although the posting of informative signage may not deter the more brazen intruders from continued entry into Maurer Marsh or conducting incompatible uses such as camping or waste disposal therein, such signage could serve to educate and dissuade other, more considerate persons from contributing to further resource damage, helping to reduce cumulative impacts to the ESHA.

Thus, given the significance of the coastal resources affected by the decision and the precedential value of the local government's decision for future interpretations of its LCP (i.e., eschewing application of the signage requirement), the approved development's conformance with the ESHA and wetland protections policies of the LCP is in question. Furthermore, as Sections 30233 and 30240 of the Coastal Act require that wetlands of the coastal zone be protected from the impacts of development and the cumulative impact of the loss of wetlands and wetland habitat over time throughout the coastal zone has been significant, the appeal raises issues of statewide significance rather than just a local issue. Therefore, the Commission finds that the approved project raises a substantial issue of conformance with the ESHA protections of the certified LCP, including the provisions of the LUP's Natural Resources Policies 6.A.1, 6.A.3, and 6.A.7, and specifically, Section 156.052(P) of the Coastal Zoning Regulations, requiring that informational signage be incorporated into wetland buffers to prevent untoward intrusions into ESHAs.

2. Conclusion.

All of the various foregoing contentions have been evaluated against the claim that they raise a substantial issue of conformance of the local approval with the certified LCP. The Commission finds that, as discussed above, the appeal raises a substantial issue with respect to the conformance of the approved project with the policies of the LCP regarding protection of environmentally sensitive habitat areas.

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

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

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

Wildlife Habitat Utilization and Impact Assessment

As discussed above, because the proposed use would not provide the 100-foot buffer width around the wetlands in the vicinity of the project site, the development must conform to the certified LCP provisions that require determination of the adequacy of any reduced-width buffers to protect the ESHA resources within the wetlands. Because the analysis provided by the applicant was insufficient to determine the adequate buffer width needed to protect the ESHA within the adjoining wetlands comprising Maurer/Palco/Railroad/East Marshes and on the project site a findings of consistency with LUP Natural Resources Policy 6.A.19 and Coastal Zoning Code Section 156.052(O) cannot be made at this time.

LUP Natural Resources Policy 6.A.7 and Coastal Zoning Code Sections 156.052(D) and (E) instruct that development not be permitted unless it has been shown to be sited and designed to prevent impacts which could significantly degrade environmentally sensitive habitat areas and be compatible with the continuance of such areas. Given the above requisite findings for approval, *de novo* analysis of the coastal development permit application by the Commission would involve consideration of wetlands and ESHA issues and the associated policies and standards of the certified LCP.

The habitat and wetland assessment prepared for the project approved by the City does not fully analyze the intrinsic impacts the commercial sales and services uses would have on the wetland habitat onsite and in the vicinity of the site and the adequacy of the reduced-width buffers to protect these resource areas. The presence or absence of utilization of the site by wildlife was not comprehensively determined, especially the locations in close proximity to planned truck loading activity areas where such wildlife utilization may be disrupted due to development noise, light, and human presence. To properly determine the adequacy of the proposed reduce-width wetland buffers, the applicant must submit a biological evaluation addressing: (1) the vegetation composition detailed to the plant community or association level, of the onsite and adjoining wetland areas, particularly those zoned Natural Resources (NR) and lying within 250 feet of the project site; (2) the various resident and migratory wildlife species that inhabit or utilize the subject wetland areas; (3) the various resting, feeding, breeding, and nesting requirements of these species; (4) the relative susceptibility of the species engaging in these activities at the site to disturbance; (5) the transitional habitat needs of these species between the wetlands and the development; and (6) a qualitative and quantitative analysis of the anticipated noise and lighting levels and other human disturbances associated with the development, and how and to what degree any proposed buffer between the development and the ESHA with the inclusion of any other mitigation measures (e.g.,

wall barriers, landscaping, and site design restrictions) would reduce potentially significant impacts to the habitat functions of the ESHA.

Off-site and/or In-lieu Mitigation/Enhancement/Restoration Alternatives

Depending upon the conclusions reached in the habitat assessment and impact assessment required above, the development may be found to entail significant direct, indirect, or cumulative ESHA impacts that cannot be mitigated for at the project site through imposition of a full 100-foot-wide buffer and/or installation of other protective amenities without rendering development at the subject site economically infeasible. Therefore, as provided for under Coastal Zoning Regulations Section 156.052(E), where mitigation, restoration, or enhancement activities are required to be performed pursuant to other applicable portions of the LCP, such activities shall be required to be performed on city-owned lands, specifically on the Elk River Spit or on other available and suitable mitigation, restoration, or enhancement sites, such as Palco Marsh, or recently acquired Maurer Marsh.

In correspondence received from the applicant (see Exhibit No. 12, page 3 and 10-11), the applicant indicates that, given the size and configuration of the project parcels and their location relative to adjoining major streets, no practicable or economically viable opportunity exists for partially restoring adjacent wetlands ESHA through incorporation of larger buffers that exist currently at the site. Alternately, in correspondence from the applicant's consultants, an offer is made to rehabilitate the homeless encampment area near the project site by cleaning up the discarded solid waste therein and revegetating an approximately 1,000 square-foot disturbed area with native alders and willows (see Exhibit No. 12, page 26).

Thus, should any requisite mitigations, enhancement or restoration work be determined not to be feasibly attainable on the project parcels, the applicant shall identify alternative City-owned sites where such required work can be effectively performed.

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

III. EXHIBITS:

Use the link at left to go to the exhibits.

1. Regional Location Map
2. Vicinity Map
3. Project Site Aerial
4. Approved Site Plan
5. Superseded, Originally-proposed Project Site Plan
6. Notice of Final Local Action

7. Appeal, filed May 5, 2006 (Wan & Caldwell)
8. Wetlands Delineation and ESHA Buffer Analysis Reports
9. Agency Review Correspondence
10. Applicant's Response to California Department of Fish and Game's Comments
11. Applicant's Response to U.S. Army Corps of Engineers' Comments
12. Applicant's Correspondence
13. General Correspondence