

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT OFFICE
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV

Th16a



Appeal filed:	6/1/2007
Staff report prepared:	8/21/2008
Staff report prepared by:	Susan Craig/Alyse Larkin
Staff report approved by:	Dan Carl
Hearing date:	9/11/2008

APPEAL STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

Appeal numberA-3-SCO-07-029, Zar Commercial Facility

Applicant.....Randy Zar

Appellant.....Jarl Saal

Local governmentSanta Cruz County

Local decisionSanta Cruz County Coastal Development Permit (CDP) 04-0650 approved by the Santa Cruz County Planning Commission on April 25, 2007.

Project locationSouth side of McGregor Drive fronting Highway 1 adjacent to Borregas Creek in the Aptos area of south Santa Cruz County (APN 038-061-07).

Project description.....Recognize an existing commercial building, establish a master occupancy program of allowed commercial service uses, remove a portion of an existing building, and install a parking lot with related improvements.

File documents.....Administrative record for Santa Cruz County CDP Number 04-0650; Santa Cruz County certified Local Coastal Program (LCP)

Staff recommendation ...**No Substantial Issue Exists**

A. Staff Recommendation

1. Summary of Staff Recommendation

Santa Cruz County approved a CDP to recognize an existing commercial building, to establish a master occupancy program for the building to allow a range of commercial service uses, to remove a portion of an existing building, and to install a parking lot with related improvements at 2000 McGregor Drive (APN 038-061-07) near Borregas Creek fronting Highway 1. The Appellant contends that the County's action was inappropriate because the slope of the Applicant's site is unstable and poses an imminent threat to public safety, the County has not required the Applicant to vacate the site while stabilization measures are put in place, the County has given the Applicant an unreasonably long time to cure these stability conditions, and the County has not required the Applicant to remediate degradation of Borregas Creek on his property. The County's approval, however, is premised on remediating site stability issues, controlling site drainage, and enhancing the health of the Borregas Creek riparian corridor. The



County's approval also addresses a confusing site history in terms of permitting issues, resolving those issues in an LCP context. Thus, staff believes that the County's action adequately addressed LCP issues engendered by the appeal. The County's conditions requiring drainage and erosion control improvements, riparian plantings, as well as requiring compliance with all recommendations of the project's geotechnical report adequately protect Borregas Creek and address site stability in relation to the applicable LCP policies. Thus, the appeal contentions do not raise a substantial issue with respect to the County's Local Coastal Program (LCP). **Staff therefore recommends that the Commission find that no substantial issue exists with respect to the grounds on which the appeal was filed, and that the Commission decline to take jurisdiction over the CDP for the subject project.** The motion and resolution to effect this recommendation are found immediately below.

2. Staff Recommendation on Substantial Issue

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the County's decision in this matter would be final (conversely, a finding of substantial issue would bring the project under the jurisdiction of the Commission for hearing and action).

Motion. I move that the Commission determine that Appeal Number A-3-SCO-07-029 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 of No Substantial Issue. Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo 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 No Substantial Issue. The Commission hereby finds that Appeal Number A-3-SCO-07-029 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.



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 - Exhibit 6: Applicable LCP Policies
 - Exhibit 7: Geotechnical Reports

Use the links
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B. Findings and Declarations

The Commission finds and declares as follows:

1. Project Location

The County-approved project is located on an approximately 10,500 square foot lot in the Aptos area of south Santa Cruz County. It is located on the south side of McGregor Drive, a frontage road immediately adjacent to Highway 1, which lies to the north. Access to the site is from McGregor Drive across an approximately 3,000 square foot County right-of-way area between McGregor Drive proper and the property boundary. The property is bordered by Borregas Creek to the west, a First Alarm commercial facility and property (also fronting McGregor Drive and owned by the Appellant) to the east, and a residential parcel (also owned by the Appellant) to the south. The property is slightly sloped (i.e., 2-10% slopes) where the existing building is located, and more steeply sloped as the property drops off toward the creek to the west. See Exhibit 1 for project location maps, Exhibit 2 for the project’s site plan, and see pages 6-24 of Exhibit 5 for the Appellant’s photographs of the site and surrounding area.



2. Project Description

History

The subject property and the Appellant's adjacent property were originally a single parcel (APN 038-061-06). In 1962, County Building Permits 1594 and 1474 were issued to Eva Bernard for the relocation of a commercial building to what is now the Appellant's property. Between 1962 and 1967 several grading projects occurred, which is evident from aerial photographs. It is likely that the two sewer manholes that are located on the Applicant's property were buried during this time. Additionally, APN 038-061-06 was divided into APNs 038-061-07 and 08 during this period (APN 038-061-07 is the subject site and APN 038-061-08 is the Appellant's adjoining property). On June 13, 1967, County Building Permits 3732 and 4617 were issued to erect a garden sales area and to install plastic over an existing lath house to serve as a nursery on the Applicant's property (APN 038-061-07).¹ Over time, the nursery transitioned into other commercial uses and was remodeled and expanded, all apparently without required permits.²

In 1996 the current Applicant, Randy Zar, purchased an interest in APN 038-061-07 from then owner Brent Byard. Soon after, Santa Cruz County Public Works staff visited the site in search of one of the buried manholes. Upon learning that Mr. Zar was a contractor trained in excavation, the County entered into an agreement with J.R. Zar Contracting to locate and raise the buried manhole and grade a new access route to it. On July 1, 1996 the County issued Riparian Exception 96-0396, authorizing approximately 50 cubic yards of grading and the construction of 3-foot high retaining walls to create an access road to the existing sanitary sewer manhole.³ The excavation project was monitored by staff from the County Public Works Department. In 2004, Mr. Byard transferred all remaining property interest to the Zar family (Aviar Living Trust), the current Applicant.

See Exhibit 4 for a County-prepared timeline of events for APN 038-061-07, and see pages 6-24 of Exhibit 5 for the Appellant's photographs of APN 038-061-07 from the 1970s to the present.

Proposed Project

Over the years there have been multiple red tags and code compliance complaints associated with the subject site. In order to clear title and resolve the confused development and permitting history related to the site, the Applicant has proposed to have the existing commercial building recognized, to remove a portion of the existing building, to establish a master occupancy program to provide for commercial service uses, and to install 9 parking spaces next to McGregor Drive. Because the parking spaces would be located on the County right-of-way area used for accessing the property, the Applicant would first

¹ Nurseries were an allowed use in the zone district and did not require permits at that time.

² The building itself has a convoluted history and it is difficult to determine exactly what has happened to the building over time. It is certain that a good amount of construction and demolition has occurred judging by photos of the building from the seventies (see pages 6-24 of Exhibit 5). However, if one compares these photographs of the building to photos from today, one can see that the basic footprint of the building is roughly the same. In fact, the only actual *addition* to the building, which is also the portion of the building that is closest to the creek, is set to be demolished as part of the proposed project (as shown in Exhibit 2).

³ The manhole was eventually found to be 11 feet from the original location shown on the 1996 plans. This location accounted for an excavation that was larger than the anticipated 50 cubic yards.



need to acquire the land from the County (see the project site plan in Exhibit 2). In other words, the proposed project is designed recognize a commercial operation whose pedigree pre-dates the Coastal Act, but whose development history has been somewhat confused and uneven. The proposed project thus would provide a “clean slate” of sorts for the site, establishing a clear regulatory baseline against which to measure future use and development. The project requires a CDP, a County commercial development permit, and a variance (the latter to allow development within the required 30-foot rear yard setback).⁴

3. Santa Cruz County CDP Approval

On April 25, 2007, the Santa Cruz County Planning Commission approved CDP 04-0650.⁵ This final County CDP action was preceded by a series of County hearings over several years involving the subject application. In fact, the County Zoning Administrator first approved the project on November 18, 2005. That initial approval was appealed by the current Appellant to the Planning Commission, and several Planning Commission hearings preceded the 2007 final County CDP decision. Santa Cruz County ultimately found the project to be consistent the LCP, including the site’s commercial land use designation.⁶ In addition, the site is located within the Highway 1 scenic corridor viewshed, and the County found the proposed commercial development to be in compliance with the LCP’s viewshed requirements “in that the structure is sited and designed to be visually compatible, in scale with, and integrated with the character of the surrounding commercial development.” With respect to Borregas Creek issues, the County states that “the proposed development is considered as being located within an existing disturbed area even though portions of the project site contain a riparian resource”, including as evidenced by the 1996 Riparian Exception (96-0396) issued for grading and retaining walls in this area. The County required the project to comply with the project geotechnical report recommendations, and premised their approval on the Applicant acquiring the 3,000 square foot of right-of-way used to access the site from McGregor Drive.⁷

Notice of the Planning Commission’s final CDP action was received in the Coastal Commission’s Central Coast District Office on May 17, 2007. The Coastal Commission’s ten-working day appeal period for this action began on May 18, 2007 and concluded at 5 p.m. on June 1, 2007. One valid appeal (see below) was received during the appeal period.

4. Appeal Procedures

⁴ Currently, the setback is between 5 and 6 feet. The County determined that, given the small size of the property, a newer addition at the rear of the building should be demolished to increase the setback to 16 feet instead of 30 feet, and the Applicant applied for the demolition and the 16-foot setback.

⁵ See Exhibit 3 for the County Staff Report to the Planning Commission.

⁶ The site is designated C-S (Service Commercial) in the LCP Land Use Plan (LUP), and C-4 (Commercial Service) in the LCP Implementation Plan (IP).

⁷ Special Condition F(1) of the County’s approval states that if the Applicant does not acquire the right-of-way within 12 months from the effective date of the permit, then the permit will become null and void.



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

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b) of the Coastal Act requires the Commission to conduct a de novo CDP hearing on an appealed project unless a majority of the Commission finds that “no substantial issue” is raised by such allegations. Under Section 30604(b), if the Commission conducts a de novo hearing and ultimately approves a CDP for a project, the Commission must find that the proposed development is in conformity with the certified LCP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission approves the project following a de novo hearing.

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

5. Summary of Appeal Contentions

The Appellant contends that:

- The Applicant’s site consists of more than 2,000 cubic yards of illegal, uncompacted fill, which has led to slope instability that threatens the lives of anyone present on either the Applicant’s or the Appellant’s properties.
- The County approval does not require the Applicant to vacate the existing building while measures are being taken to stabilize the slope.
- The County approval gives the Applicant an unreasonably long time to cure these problematic slope



stability conditions.

- Erosion of the fill into Borregas Creek has caused environmental degradation of the riparian corridor on both the Applicant's and the Appellant's properties, and that the County's approval fails to address or remediate these impacts.

See Exhibit 5 for the complete appeal document, including photographs of the project site.

The Appellant's contentions are broad assertions based on what the Appellant has identified as issues with the project. However, the Appellant's contentions have not been raised in terms of LCP or Coastal Act conformity issues.⁸ Thus, the Commission here construes the appeal broadly in terms of compliance with the primary two LCP issue areas engendered by this appeal, namely site stability and potential degradation of the Borregas Creek riparian corridor.

6. Substantial Issue Determination

A. Applicable LCP Policies

The LCP protects against inappropriate development related to site stability and creek resource protection. In terms of the nearby creek resources, there are several LCP policies and related IP sections that require that riparian corridors and creeks be protected. For example, LCP Policy 5.1.2 defines riparian corridors as environmentally sensitive habitat, and Policy 5.2.1 defines their width and buffer requirements (in this case, a 40-foot setback is required from the creek). Policy 5.2.3 states that development, land alteration, and vegetation disturbance are prohibited within riparian corridors, and Policy 5.1.12 requires the restoration of degraded riparian habitat (commensurate with project impacts) as a condition of development approval. In terms of site stability, the LCP generally requires the avoidance of hazards and mitigation for those that are unavoidable (e.g. compliance with geotechnical reports, etc.). For example, LCP Policy 6.2.1 and IP Section 16.10.050, require geologic hazards assessments for all development that might be affected by slope stability. Additionally, IP Section 16.10.060 states, "A full geologic report shall be valid and all recommendations therein shall remain in effect for three years from the date of completion of the report." And finally, IP Section 16.10.090 states that a development permit shall be denied if the geologic hazards cannot be adequately mitigated. Also related to both portions of the appeal are erosion control policies. Erosion on the Applicant's property would affect both soil stability and riparian health. See Exhibit 6 for applicable LCP Policies.⁹

B. Analysis

Site Stability

As required by the LCP, the Applicant provided a geotechnical report to identify the site's stability issues (prepared by Terra firma Engineering and Science). Pursuant to the Planning Commission's

⁸ As indicated above, the grounds for appeal under Section 30603 of the Coastal Act are limited to allegations that the development does not conform to the certified LCP and/or the public access policies of the Coastal Act.

⁹ Ibid; Appellant has not identified LCP policies.



request, the geotechnical report was supplemented to address specific questions and issues, including those raised by the Appellant. The final accepted geotechnical report¹⁰ makes several recommendations that address site stability, including:

- Installation of a supplementary tie-back retaining wall running parallel to the creek bed and the western wall of the existing building with 2-foot diameter piers spaced 10 feet apart and embedded 12 feet into firm underlying soil with total depths of 25-35 feet.
- Tie backs installed at an angle to support the piers, extending underneath the existing building.
- Installation of a 6-foot retaining wall above the tie back wall to ensure slope stability and prevent slope failure during seismic events.

The Planning Commission subsequently conditioned the approval of the development permit upon the recommendations of the geotechnical report. The County found that with these modifications, potential stability hazards would be abated. In his appeal, the Appellant cites the presence of 2,000 cubic yards of allegedly illegal uncompacted fill, water saturation, gravity, and the weight of the structure as reasons that this is not the case. However, the geotechnical report recommendations were prepared by a licensed engineering firm, were accepted by the County's engineers and geologist, and there is an absence of compelling evidence to conclusively indicate that the stability issues have been addressed inappropriately by the County in this respect. On the contrary, the County appears to have followed their LCP regarding such stability issues. The County's action addresses site stability issues, and includes a series of measures for better stabilizing the site and slope, including through implementing the geotechnical recommendations identified.

With respect to the contention that the County's permit is inadequate because it does not require the Applicant to vacate the building until site stability is improved, there is no compelling evidence in the record to conclusively indicate this is required by the LCP. The building on the Applicant's site has not been labeled "Unsafe to Occupy" and no "Notice of Geologic Hazard" has been filed with the County Recorder (per IP Section 16.10.105). The record indicates that certain stability issues must be improved as part of the County's approval, but that the situation is not so dire as to require the site to be vacated until these improvements take place.

The Appellant further contends that the County permit gives the Applicant an unreasonably long time to cure slope stability issues. Although the County has not required immediate site stability improvements (including due to any perceived lack of safety in the interim), it is reasonable to presume that the improvements will be made in short order once the coastal permit approval is effective. There is certainly nothing on record that conclusively suggests that they won't occur in a timely manner. In addition, a primary purpose of this permit is to clear the property's history of red tags, code violation complaints, and permit problems. If the County's approval conditions are not fulfilled, then a basic premise of the application is undone and the Applicant will have to answer to County code enforcement. In addition, in terms of the geotechnical recommendations, the LCP states that they remain valid for

¹⁰ See Exhibit 7.



three years; in this case, through 2010.¹¹

Finally, LCP Policy 6.3.3 requires that any grading or drainage problems that give rise or could give rise to erosion be abated as a condition of approval. IP Section 16.22.040 indicates that no person shall allow the continued existence of a condition that is causing or could cause accelerated erosion. Additionally, IP Section 16.20.060 states that prior to permit issuance, an erosion control plan shall be submitted and approved. The County's approval is consistent with these requirements, requiring that "Grading, drainage and erosion control plans that are prepared, wet-stamped, and signed by a licensed civil engineer" be submitted as a part of a Grading Permit prior to issuance of the CDP. Moreover, the County has required that the Applicant comply with the recommendations of the approved geotechnical report (as indicated above). This report requires the Applicant to construct a closed drainage system to better collect and direct drainage and avoid stability problems at the site (per the requirement stated in IP Section 16.22.060(c)).

Riparian Corridor

Borregas Creek, which is sometimes called Borregas Gulch, is an intermittent creek that flows through a culvert under Highway 1 and McGregor Drive across the site and to the shoreline near the upcoast end of Las Olas Drive. Borregas Creek varies in flow and, per the LCP, is most aptly described as an "ephemeral stream."¹² LCP Policy 5.2.3 and IP Section 16.30.040 state that, for ephemeral streams, the required buffer distance is 30 feet from "the top of a distinct channel or physical evidence of the high water mark," with a 10-foot setback from the edge of the buffer for all structures; this equals a 40-foot total buffer from the creek in this case. According to the site plans, the existing building on the Applicant's property complies with the required LCP setback. On the other hand, also according to the site plans, the current parking area, deck, stairs, graded area, fencing, sewer line, and storage area appear to be located, in places, a few feet into the required setback area (see site plan in Exhibit 2). As previously indicated, some of this development appears to precede coastal permit requirements (e.g., the sewer line), and some of it has been permitted (e.g., the relocated sewer manhole). Thus, as far as the Commission understands it, the development partially located in the LCP setback in question is coastal permitted or precedes coastal permitting requirements.

Given the site's history, its location near McGregor Drive and Highway 1, and the nature of the slope stability issues, the impact of recognizing a slightly reduced setback in this case can be found to be consistent with the LCP. Requiring an expanded buffer (i.e., requiring existing development within the 40-foot buffer—or an even larger buffer—to be removed) would provide more resource protection, as is almost always the case, but in this case the County's approval satisfies the intent of the LCP in relation

¹¹ IP Section 16.10.060 states, "A full geologic report shall be valid and all recommendations therein shall remain in effect for three years from the date of completion of the report. The exception to the three year period of validity is where a change in site conditions, development proposal, technical information or County policy significantly affects the technical data, analysis, conclusions or requirements of the assessment or report." The full geotechnical report, including all supplemental material, was completed in March of 2007, and thus should be valid per the LCP until March of 2010. There is no compelling evidence in the record to suggest that there have been any changes that would significantly affect its findings.

¹² IP Section 16.30.030 defines ephemeral streams as, "A natural watercourse or portion thereof which flows only in direct response to precipitation, as identified through field investigations."



to the site history and the riparian values here. The minor incursion into the 10-foot setback that applies on top of the 30-foot riparian buffer should have negligible resource impacts, and it recognizes the overall permit and site history in that respect. In addition, the geotechnical report recommendations require that the slope below the structures and down into the riparian corridor be improved through plantings. Specifically, the report encourages the planting of redwood trees or some other type of vegetation with high evapo-transpiration rates. It also states that the Applicant should plant willow fascines at the toe of the slope to ensure slope stability; they will also promote enhanced riparian vegetation.¹³ This is particularly important in the southwest corner of the property because it is lacking in overhead tree and shrub cover that is normally present in riparian habitats.¹⁴ Erosion and degradation appear to have occurred in this area and replanting the riparian corridor with woody vegetation will help with both slope stability as well as riparian corridor health.

With respect to the Appellant's contention that erosion from the site into Borregas Creek has caused degradation of the riparian corridor on both the Applicant's and the Appellant's properties, that may be true. In any case, though, the County approval requires enhanced erosion and drainage control, requires additional slope stability improvements, and requires additional slope plantings, all of which should serve to address and abate potential erosion from the site into the riparian corridor, and should serve to enhance riparian corridor health in the long run.

C. Substantial Issue Determination Conclusion

The Appellant has identified some valid issue areas to which the LCP applies, but the appeal does not rise to the level of substantial issue. The County's CDP approval appears to respond to the site history and adequately implement the LCP at this site, including in relation to site stability, public safety, erosion control, and riparian corridor protection. The site has been professionally evaluated for stability and erosion control, and improvements in this respect are required by the County's approval. Additionally, the project should result in riparian enhancement through replanting and drainage improvements at the site. In short, the County-approved project appropriately addresses a long standing and confusing history in relation to the LCP. The Commission finds that no substantial issue exists with respect to the grounds on which the appeal was filed, and declines to take jurisdiction over the CDP for this project.

¹³ Willow fascines are long bundles of live willow planted along the bank that will sprout and develop a root mass that will help hold the soil in place and protect and enhance riparian resource values.

¹⁴ As observed by Commission staff during a site visit on July 9, 2008. The approved geotechnical report also noted this in the supplemental materials, submitted March 5, 2007 (see Exhibit 7, page 23).

