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Th24b

Prepared August 14, 2013 for August 15, 2013 Hearing

To: Commissioners and Interested Persons
From: Madeline Cavalieri, District Manager
Daniel Robinson, Coastal Planner
Subject: **STAFF REPORT ADDENDUM for Th24b**
Appeal Number A-3-SLO-11-061 (McCarthy SFD Revised Findings)

The purpose of this addendum is to respond to comments regarding the revised findings staff report for the above-referenced item. Specifically, two days before the scheduled hearing, staff received a letter from the Applicants' legal representatives (dated August 12, 2013; see copy in the Central Coast District Deputy Director's Report, Item 18 on the Commission's August 15, 2013 agenda) necessitating a response from staff, including one change to the proposed revised findings to conform the summary of the Commission's action to the revised findings text.

Commission's Failure to Timely Act

Regarding the Applicants' allegation that the Commission failed to timely act on the approved project, this is not an issue that can appropriately be raised in the context of a hearing to approve revised findings. The purpose of the hearing on revised findings is to give the Commission the opportunity to determine whether the written findings prepared by staff accurately reflect the action that the Commission has already taken. As explained briefly below, the Applicants' assertion that the Commission's action was not timely is inaccurate, but even if it were accurate, the Commission's action was final after the January 10, 2013 hearing, so this allegation is unrelated to the Commission's approval of these revised findings.

This issue has been raised by the Applicants in the writ petition that they filed against the Commission and will be appropriately addressed in detail those proceedings. In brief, however, the Commission's actions were consistent with the Coastal Act and regulatory requirements for actions on appeals. The Commission received a valid appeal of San Luis Obispo County's action approving a single-family residence and related development on and near the Applicants' property. Section 30625 requires that the Commission hear an appeal unless it determines that no substantial issue exists with respect to the grounds on which the appeal was filed. It states that the Commission must act on the "proposed development" within the timeframes laid out in Sections 30621 and 30622.

As required by these three Coastal Act sections taken together, the Commission found that the appeal presented a substantial issue. It then proceeded directly to the de novo portion of the

hearing, which it is required to conduct in accordance with the procedures laid out in sections 13057-13096 of the Commission's regulations (14 CCR §§13057-13096). Section 13092 of the Commission's regulations requires that votes by the Commission shall only be on the affirmative question of whether the permit should be granted. A "yes" vote approves the permit and a "no" vote denies it. In this case, the Commission voted "no," thereby denying the proposed development, consistent with the requirement in Section 30625 (in concert with Sections 30621 and 30622) that the Commission approve, modify or deny the proposed development within 21 days of the de novo hearing.

Additionally, the Applicants argue that the Commission in its de novo review voted not on the project as approved by the County (which Applicants call the "Approved Project") but instead on the project as conditioned by Commission staff in its recommendations (which Applicants call the "Staff Recommended Project"). From this, the Applicants contend that the so-called "Approved Project," supposedly not having been voted upon, became final 21 days after the de novo hearing.

This argument ignores the meaning and purpose of "de novo" review. "De novo" review "contemplates not simply a new public hearing, but that all matters involved be decided 'anew,' 'afresh,' and 'over again.' ... In other words, the Commission must hold an entirely new hearing evaluating all aspects of the permit application as if no decision had previously been rendered." (*Coronado Yacht Club v. California Coastal Com.*, 13 Cal.App.4th 860, 871-872 (1993) [citing *Rea Enterprises v. California Coastal Zone Conservation Com.*, 52 Cal.App.3d 596, 613 (1975)].) The Commission was not required to vote to approve or deny the "Approved Project." It was required to review and vote on the permit application as if there had been no prior decision on it. The Commission did so.

Stated Grounds for Denial

Regarding the Applicants' allegation that the proposed revised findings do not reflect the Commission's stated grounds for denial, Commissioners gave staff direction as to the aspects of the project that were inconsistent with the LCP, and the revised findings support those comments with facts that were in the record at the time of the hearing.

The first argument, that the Commission never acted on the approved project, has been clarified above. The Commission denied the proposed project, consistent with the requirements of the Coastal Act and its regulations. Thus, this argument is without merit.

The second argument, that the revised findings fail to reflect the action of the Commission, is once again without merit. As the Applicants themselves note, the Commission deliberations clearly indicated concerns with the mass and scale of the overall development, including explicitly the size and scope of the single-family residence as it related to the disturbed scarp/pad area. Concerns were also stated regarding the development's impacts on public views from any number of locations in an around the Pirate's Cove area.

The specific public views affected by the proposed project were described at length in the original staff report that went to hearing. The Commission disagreed that the project, as proposed to be conditioned by staff, adequately addressed those impacts and that the modified project was

consistent with the certified LCP, but it did not question the findings identifying the project's impacts.

Also as noted by the Applicants, the Commission identified well reliability and the Applicants' clear desire to seek an LCP amendment to obtain CSA 12 water as concerns with staff's recommendation to approve the appealed project, as conditioned. While the original staff report identified some concerns related to the well and the lack of an official County permit for the well, Commissioners expressed additional concerns regarding the potential reliability of the on-site well. The revised findings reflect and support these statements.

Based on facts in the record at the time of the hearing, staff's proposed revised findings address the additional well-related and visual resource concerns raised by the Commission at the January 10, 2013 hearing. The Commission's regulations require the staff to propose revised findings that "reflect the action of the commission," not that the revised findings import verbatim the statements made by Commissioners. The proposed revised findings address the visual resource and water reliability issues identified by Commissioners and revise the original staff recommendation to reflect these concerns and the basis for them. If the Commission determines that these findings do not accurately reflect the action that it took in January, it may modify them to more accurately address the concerns that it raised at that time.

The court in *La Costa Beach Owners' Association v. California Coastal Commission*, 101 Cal. App. 4th 804, 819 (2002) rejected an argument that the Commission's revised findings in that case were nothing more than "post hoc rationalizations" for its decision. This is exactly what the Applicants are arguing here. The court in *Ocean Harbor House Homeowners Assn. v. California Coastal Com.*, 163 Cal.App.4th 215 (2008), similarly rejected an argument that revised findings reflected "post hoc rationalizations" where, as here, the original staff report put the Applicants on notice of the issues to be considered by the Commission and the revised findings revised the report to reflect the Commission's ultimate decision.

One of the cases cited in the Applicants' written comments (*Sierra Club v. California Coastal Com.*, 107 Cal.App.4th 1030 (2003), subsequently depublished) undercuts the Applicants' objections. In rejecting an argument that the Commission's revised findings constituted "post hoc rationalizations," the court in *Sierra Club* explained: "[I]t is one thing to say that the agency's reasoning must precede its decision. It is quite another to say, as the Sierra Club argues, that the written findings which manifest the agency's reasoning must precede the decision. . . . the process of documenting the reasoning leading up to a decision may follow the actual rendering of that decision."

While a court may ultimately decide whether the record before the Commission and its findings constitute substantial evidence in support of its decision, the Commission may properly determine at this hearing whether the revised findings accurately reflect the basis for its decision.

The Proposed Revised Findings Are Contrary to the LCP

Finally, the Applicants request that the Commission find that the revised findings are inaccurate because: (1) CSA water service to the project is consistent with the LCP; (2) the use of an on-site well to serve the project is consistent with the LCP; (3) the project does not create LCP-protected

visual impacts; and (4) the project is consistent with applicable public access and recreation provisions.

The Applicants made the first and third arguments to the Commission at the hearing in January, the original staff report issued in advance of the hearing addressed those arguments, and those arguments were rejected by the Commission. It is too late for the Applicants to re-argue issues heard and already decided by the Commission at that time. Thus, neither of these arguments raises a basis for the Commission to reject the proposed revised findings.

Regarding the Applicants' second issue, during the hearing Commissioner Zimmer raised some concerns regarding the lack of an official approval of the Applicants' on-site well by the County's Department of Environmental Health. She, and other Commissioners, also expressed concerns about the well's reliability, particularly in light of the Applicants' persistent efforts to obtain CSA 12 water, rather than relying on the on-site well. Based on these comments, and evidence in the record at the January hearing, staff proposed revised findings that identified questions regarding the existence of a reliable water source as a basis for the Commission's denial of the project. The revised findings do not suggest that use of an on-site well is, in and of itself, inconsistent with the LCP. Instead, the findings reflect that there was insufficient evidence in the record at the time of the Commission's action for Commissioners to be sure that the well was adequate in this case. If Commissioners believe that the proposed findings do not accurately reflect their action, they may modify them at this hearing.

Finally, the Applicants claim that the revised findings should be rejected because the project is consistent with the public access and recreation provisions of the LCP and Coastal Act. In fact, the proposed revised findings conclude that the applicable public access and recreation provisions are not a basis for the Commission's denial of the project (and changes are identified to make that clear in the summary of the revised findings report as well, see below). Thus, the findings should not be read to suggest that the project could not be found consistent with applicable public access and recreation policies. Because the Commission voted to reject the proposed development on other grounds, the findings do not include conditions or evidentiary support for conditions that would ensure the project's consistency with applicable public access and recreational requirements. Staff believes that the proposed revised findings accurately reflect the Commission's action in January to deny the project on other grounds.

Modifications to Revised Findings Staff Report

That portion of page 6 of the staff report dated July 25, 2013 is modified as shown below. Text in underline format indicates text currently identified in the staff report to be added to the findings, and text in ~~striketrough~~ format indicates text currently identified in the staff report to be deleted. Text in double underline format indicates new additions per this addendum, and text in ~~double striketrough~~ format indicates new deletions per this addendum, as follows:

In addition, on de novo review, it is important that any residential development not adversely impact public recreational access. This is required by both the LCP as well as the access and recreation policies of the Coastal Act that apply here because the site is located between the first public road and the sea. As indicated, the very popular Pirates Coves beach and recreational facility is located directly seaward of this site. The recreational trail that connects Avila Beach to Pismo Beach also extends along the base of this site. Both the trail and Pirates Cove parking

lot and beach trail are going to be enhanced through a County Parks project in the very near future. In addition, a well-worn trail extends from the parking lot along Cave Landing and up the subject property where it connects to a series of trails atop Ontario Ridge itself, including trails that extend back down the other side of the ridge to Avila Beach Road as well as trails that extend along the ridge toward Pismo Beach. This trail access across the property is also a very popular pedestrian route, and the public has been using it for many years as if it were a public trail. Any approved project should protect such public access (and the Applicants have long indicated that they have no intention of closing off these public access trails on the property in discussions with staff, but on January 4, 2013 the Applicants' representative informed staff that the Applicants no longer acknowledge that a public trail exists nor support such continued access). ~~The project does not protect access along the trail inconsistent with the Coastal Act and the LCP. The Coastal Act and the LCP would suggest that such negative public recreational access impact be avoided, and if not avoidable minimized and mitigated. However, these trails are located on private property, and there has not yet been a formal adjudication establishing whether there has been an implied dedication of a public access easement at this site. Thus, the Commission finds that although the trails in question are important components of the trail system in the Pirates Cove area, and likewise important components of the CCT system at this location, without further evidence in the record, the Commission cannot currently require that the Applicants provide an easement over these trails. Differing facts may change this public access context in the future, but the fact that the proposed project does not protect nor provide for continued public trail use on the Applicants' property is not a basis for denial in this case at this time.~~

Other conditions are included to mitigate for project impacts through restoration of the remainder of the site not subject to development (i.e., outside of the development/driveway footprint), to apply construction BMPs, and to require a deed restriction to record the terms and conditions of the CDP against the property.

Thus, staff recommends that the Commission approve a conditioned CDP for the proposed project. The motion is found on page 6 below.

In sum, although some components of the project that result in LCP inconsistencies could possibly be rectified by conditions of approval (e.g. by eliminating all retaining walls and patio/decks over the ASA), and although some aspects of the project could be improved otherwise (e.g., related to public trail use), the water supply, and public viewshed, ~~and public access~~ inconsistencies cannot be so readily fixed. Thus the Commission denies the coastal development permit application, encouraging the Applicants to come back with a reduced scale residential project with a secure water source that otherwise addresses coastal resource issues ~~protects public access~~, all consistent with the findings of this report.