

**CALIFORNIA COASTAL COMMISSION**

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# F18b/F18c

**Prepared October 8, 2014 for October 10, 2014 Hearing**

**To:** Commissioners and Interested Persons

**From:** Susan Craig, District Manager  
Adrian Kamada, Coastal Planner

**Subject: STAFF REPORT ADDENDUM for Items F18b and F18c  
Combined Revised Findings Report for A-3-SLO-11-055 (Kellaway) and A-3-SLO-14-0021 (7 Tracks Realty Trust)**

The purpose of this addendum is to modify Special Condition 10 on page 15 of the combined staff report dated prepared September 19, 2014 for the above-referenced items. As drafted, Special Condition 10 requires the two lots associated with the proposed developments to be legally tied together so that they are treated as a single parcel moving forward, and prohibits development on the ESHA portion of the lots (other than habitat restoration, or other Coastal Act and LCP consistent development allowed within ESHA). In order for lots to be technically combined, however, they must meet specific criteria, including that they are in the same tax rate area, they are on the same assessor's map pages, and the name of the owners of the properties are identical. None of these conditions are met in this case, so it is not possible to compel a combination through the condition. To achieve the same objective, the Special Condition has been changed to instead prohibit separate sale of the lots, and to instead require that the lots can only be sold, leased, or otherwise conveyed or transferred as part of a single unit. All of the other ESHA protections would remain. In this way, the objective of ensuring that these lots are treated as one moving forward is retained, as are the ESHA protection provisions that were critical to the Commission's decision on these matters. Thus, Special Condition 10 on page 15 of the combined staff report is replaced in its entirety with the following:

**10. Lot Unification.** *PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit to the Executive Director for review and approval documentation demonstrating that the owners of APN 074-483-025 and APN 074-022-042 have executed and recorded against these parcels a deed restriction, in a form and content acceptable to the Executive Director: (1) prohibiting all development on parcel APN-074-022-042 (except habitat restoration or other development that does not result in a significant disruption of habitat values and is dependent on the environmentally sensitive habitat area on-site); and (2) requiring that no portion of APN 074-483-025 or APN 074-022-042 shall be sold, leased, or otherwise conveyed or transferred except as part of a single unit consisting of all of the land designated by those two APNs. The recorded Deed Restriction shall include a formal legal description of the subject properties; shall be recorded free of prior liens and encumbrances that the Executive Director determines may affect the enforceability of the restrictions; and shall run with the land, binding all successors and assigns.*

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# F18b/F18c

CDP A-3-SLO-14-0021 approved: 06/11/2014  
CDP A-3-SLO-11-055 denied: 06/11/2014  
Staff report prepared by: A.Kamada  
Staff report approved by: D.Carl  
Staff report date: 09/19/2014  
Hearing date: 10/10/2014

## REVISED FINDINGS

**Application Numbers:** **A-3-SLO-11-055:** 12,400 square-foot single-family residence  
**A-3-SLO-14-0021:** 5,000 square-foot single-family residence

**Applicant:** **A-3-SLO-11-055:** Thomas Kellaway  
**A-3-SLO-14-0021:** 7 Tracks Realty Trust

**Project Location:** Two adjoining undeveloped parcels in the community of Los Osos in San Luis Obispo County:  
**A-3-SLO-11-055:** Undeveloped 5-acre parcel on Sea Horse Lane (APN 074-022-042)  
**A-3-SLO-14-0221:** Undeveloped 0.45-acre parcel on San Leandro Court in Cabrillo Estates neighborhood (APN 074-483-025)

**Project Description:** **A-3-SLO-11-055:** Construction of a two-story 12,400 square-foot single-family residence and related development.  
**A-3-SLO-14-0221:** Construction of a two-story 5,000 square-foot single-family residence and related development.

**Commission Action:** **A-3-SLO-11-055:** Denied  
**A-3-SLO-14-0021:** Substantial Issue Exists; Approved Subject to Conditions

**Staff Recommendation:** Adopt Revised Findings

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## STAFF NOTE

On June 11, 2014, the Coastal Commission approved coastal development permit (CDP) A-3-SLO-14-0021 subject to conditions by a vote of 8-3 and denied CDP A-3-SLO-11-055 by a vote

of 12-0. The Commission's actions were consistent with the staff's recommendations. However, this report contains revisions reflecting modifications to the de novo portions of the staff report made by staff during the presentation of the projects to the Commission at the hearing. The substantial issue portion of the report is unchanged, but one special condition was added and the findings for the de novo portions have been modified from the previous version of the report. The primary changes are to the "takings" section of the report. With the changes made at the hearing, the takings analysis for these properties must be considered together as one analysis, rather than as two separate analyses as was originally proposed. Due to the significant re-write of the findings needed to make this change, staff has deleted the takings analyses for the two separate properties contained in the original report and has inserted a new analysis for the properties considered together. The substance of the two analyses is similar, but the revised framework reflects application of the unity of ownership baseline. Given the significance of the changes in that regard, staff thought it appropriate to bring the changes back to the Commission for review. Changes to the conditions and findings are shown in ~~striketrough~~ (for deletions) and underline (for additions).

For A-3-SLO-14-0021, Commissioners who are eligible to vote on the revised findings are those from the prevailing side who were present at the June 11, 2014 hearing (i.e., Commissioners Bochco, Groom, Mitchell, Pestor, Turnbull-Sanders, Song, Zimmer, and Chair Kinsey).

For A-3-SLO-11-055, Commissioners who are eligible to vote on the revised findings are those from the prevailing side who were present at the June 11, 2014 hearing (i.e., Commissioners Bochco, Cox, Groom, Howell, McClure, Mitchell, Pestor, Turnbull-Sanders, Song, Zimmer, and Chair Kinsey).

## **SUMMARY OF ~~STAFF RECOMMENDATION~~ COMMISSION ACTION**

~~This staff report is for two interrelated appeals of development on adjacent parcels. Staff recommends that the~~ The Commission found ~~find~~ that the first appeal, **A-3-SLO-14-0021** (San Leandro Development) ~~raises~~ raised a substantial issue of LCP conformance and ~~that it approves~~ approved this project subject to 10 special conditions. Regarding **A-3-SLO-11-055** (Sea Horse Lane Development), ~~staff recommends that the Commission deny~~ denied the proposed development.

The two applications are for the construction of two single-family residences on two contiguous undeveloped parcels located between Sea Horse Lane and San Leandro Court in the southwest portion of the community of Los Osos in San Luis Obispo County. The US Fish and Wildlife Service has approved a project-driven Habitat Conservation Plan (HCP), covering both parcels, that protects the federally endangered Morro shoulderband snail and its habitat. In that HCP, the impacts of both proposed single-family residences to the Morro shoulderband snail and its habitat are mitigated through required conservation easements that would be recorded on the Sea Horse Lane parcel. Furthermore, the two adjacent parcels share (or at least shared) common

ownership: Thomas Kellaway, the applicant for the Sea Horse Lane Development owned both parcels until March of 2012, when Mr. Kellaway conveyed ownership of the San Leandro Court parcel to 7 Tracks Realty Trust, of which Mr. Kellaway remains the named contact.

In separate CDP approvals, the County found that both of the parcels contained environmentally sensitive habitat area (ESHA) due to the presence of the endangered Morro shoulderband snail and its habitat, and for the Sea Horse Lane parcel additionally due to the presence of dune scrub, maritime chaparral, and oak woodland also supporting threatened Morro manzanita. In both cases, the County found that proposed development was consistent with County LCP policies governing the protection, preservation and enhancement of ESHA on the basis that the development was conditioned to satisfy the HCP mitigation measures for impacts to the Morro shoulderband snail.

On April 23, 2014, the Commission appealed the County-approved development for the San Leandro Development contending that the County approval of a residential use on a site that the County determined to be ESHA was inconsistent with the LCP ESHA policies allowing only for resource-dependent uses within ESHA. In addition, the Appellants contended that the approval of the proposed development may have a prejudicial effect on the Commission's capacity to adjudicate the Sea Horse Lane Development because of the County-imposed condition that would consolidate mitigation for both developments at issue onto the Sea Horse Lane parcel. For those reasons, staff recommends that the Commission determined that appeal of County-approved development in A-3-SLO-14-0021 (San Leandro Development) raises raised a substantial issue. ~~The Commission deadline to act on substantial issue for A-3-SLO-14-0021 is June 11, 2014.~~

~~Unless the Commission finds that the appeal does not raise a substantial issue (or if the Commission does not act)~~Subsequently, the Commission will reviewed A-3-SLO-14-0021 (San Leandro Development) *de novo*. The proposed development in San Leandro Court is a 5,000 square-foot two-story single-family residence with attached garage, driveway, septic system, and other related residential development on an approximately one-half-acre parcel. That parcel is dominated by non-native veldt grass with the presence of some non-native ice plant, and it contains a small area of highly disturbed native coastal scrub. Despite the presence of the federally protected Morro shoulderband snail, the Commission Staff Biologist, Dr. Jonna Engel, has determined that the majority of the project site does not rise to the level of an ESHA. Instead, only the northern portion of the parcel composed of coastal scrub is an ESHA, although the remainder of the parcel is within a buffer that is required to protect ESHA both on the San Leandro Court parcel and on the Sea Horse Lane parcel.

The 100-foot buffer required under the LCP to protect ESHA effectively prohibits any residential development on the San Leandro Court parcel. Thus, the Commission staff therefore recommends that the Commission approved development on the San Leandro Court parcel, but only the minimum amount of development necessary to avoid an unconstitutional taking of private property without just compensation. The ~~recommended~~ adopted conditions ~~would~~ reduced the size of the development from 5,000 square-feet to approximately 3,300 square-feet, reducing the development's impact from the proposed total lot area to approximately ~~1,702~~ 1,650 square-feet for the structures of the garage and the residence. The development footprint would

be as far from protected ESHA as is feasible, thereby rendering the development as consistent with the LCP as possible, ~~which while~~ avoiding a taking. ~~Thus, staff recommends that the The Commission approved~~ **CDP Number A-3-SLO-14-0021** with conditions.

Next, because the Commission previously determined that a substantial issue was raised in Appeal Number **A-3-SLO-11-055** (Sea Horse Lane Development), the Commission reviewed the Sea Horse Lane Development *de novo*. The proposed Sea Horse Lane Project is an approximately 12,400 square-foot single-family residence with attached garage, driveway, septic system, and other related development on an approximately 5-acre undeveloped parcel. The entire parcel is a pristine dense mixture of three different communities that each constitute ESHA. The LCP allows only resource-dependent uses within an ESHA, so residential development of the site must be denied because it is not resource-dependent. In addition, Typically, staff would recommend conditions to approve a smaller residential development in the least sensitive location on this site, in order to avoid an unconstitutional taking. As explained below, however, because application of the LCP's water services policies prohibit residential development on this site at this time (see also below), and thus the project must be denied for this reason as well, it is premature for the Commission to approve development of a single family residence on this site. The denial of the Sea Horse Lane Development does not result in an unconstitutional taking because both the Sea Horse Lane and the San Leandro Court parcels are treated as a single property for the purposes of analyzing a taking.

Moreover, even if the two parcels were not aggregated in the takings analysis, it is unlikely that denial of the Sea Horse Lane Development on water grounds alone would result in an unconstitutional taking either. The Sea Horse Lane Development is inconsistent with the LCP policies regarding water supply. The Sea Horse Lane parcel is located between the County's Urban Services Line (USL) and the Urban Reserve Line (URL), and under the LCP, CDPs for development of such parcels cannot be approved unless there is a determination that there is adequate water supply for both existing development within the USL and "development that would be allowed on presently vacant parcels within the [USL]." In this case, the Los Osos water supply is designated at alert level III, which means that the water supply demand is at or exceeding capacity. The best available science shows that water extractions from the Los Osos Groundwater Basin exceed safe yield, and that the basin suffers from seawater intrusion. Thus, the community's water supply is insufficient to meet existing demand, let alone development that would be allowed on presently vacant parcels within the USL. As a result, the proposed development is not LCP consistent. Therefore, staff recommends that the Commission deny denied CDP Number A-3-SLO-11-055.

In sum, ~~staff recommends that the Commission:~~ (1) ~~find~~ found that a **substantial issue** existed for Appeal Number A-3-SLO-14-0021 (San Leandro Development); (2) **approved** CDP Number A-3-SLO-14-0021 for ~~the proposed~~ a single-family residence on San Leandro Court subject to recommended conditions; and (3) **denied** CDP Number A-3-SLO-11-055 (Sea Horse Lane Development) for the proposed single-family residence.

The ~~three separate motions~~ to effect this recommendation are found on ~~page 6~~ below.

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## APPENDICES

Appendix – Substantive File Documents

## EXHIBITS

Exhibit 1	Location Map/Photographs of Project Sites
Exhibit 2a	Site Maps and Plans for A-3-SLO-11-055
Exhibit 2b	Site Maps and Plans for A-3-SLO-14-0021
Exhibit 3	Applicable San Luis Obispo County Local Coastal Program Policies
Exhibit 4a	LCP: Los Osos Urban Services Line-Urban Reserve Line Maps
Exhibit 4b	Documentation of the Presently-Vacant Lot within Los Osos USL
Exhibit 5	Appeal Contentions for A-3-SLO-14-0021
Exhibit 6	Commission Adopted Staff Report for A-3-SLO-11-055 Substantial Issue Determination
Exhibit 7	Commission Staff Biologist Engel’s Memo Re: Kellaway Site, Los Osos, California: ESHA Determination for the Eastern and Western Parcels
Exhibit 8	San Leandro Court Parcel Restoration Requirements
Exhibit 9	ESHA and ESHA Buffers

## I. MOTIONS AND RESOLUTIONS

### A. Revised Findings for approval of CDP A-3-SLO-14-0021

Staff recommends a YES vote. Passage of this motion will result in adoption of revised findings as set forth in this report. The motion requires a majority vote of the members of the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are Commissioners Bochco, Groom, Mitchell, Pestor, Turnbull-Sanders, Song, Zimmer, and Chair Kinsey.

*Motion: I move that the Commission adopt the revised findings in support of the Commission's action on June 11, 2014 approving Coastal Development Permit Number A-3-SLO-14-0021, and I recommend a yes vote.*

*Resolution: The Commission hereby adopts the revised findings set forth below for Coastal Development Permit Number A-3-SLO-14-0021 on the grounds that the findings support the Commission's decision made on June 11, 2014, and accurately reflect the reasons for it.*

### B. Revised Findings for denial of CDP A-3-SLO-11-055

Staff recommends a YES vote. Passage of this motion will result in adoption of revised findings as set forth in this report. The motion requires a majority vote of the members of the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are Commissioners Bochco, Cox, Groom, Howell, McClure, Mitchell, Pestor, Turnbull-Sanders, Song, Zimmer, and Chair Kinsey.

*Motion: I move that the Commission adopt the revised findings in support of the Commission's action on June 11, 2014 denying Coastal Development Permit Number A-3-SLO-11-055, and I recommend a yes vote.*

*Resolution: The Commission hereby adopts the revised findings set forth below for Coastal Development Permit Number A-3-SLO-11-055 on the grounds that the findings support the Commission's decision made on June 11, 2014, and accurately reflect the reasons for it.*

### ~~A. Substantial Issue Determination for A-3-SLO-14-0021~~

~~Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the project under the jurisdiction of the Commission for hearing and action. **A NO vote on the following motion will implement this recommendation.** Failure of this motion, as recommended by staff, will result in a *de novo* hearing on the CDP 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.~~

~~**Motion.** I move that the Commission determine that Appeal Number A-3-SLO-14-0021 raises no substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603, and I recommend a no vote.~~

~~**Resolution to Find Substantial Issue.** The Commission hereby finds that Appeal Number A-3-SLO-14-0021 presents a substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603 regarding consistency with the certified Local Coastal Program and/or public access and recreation policies of the Coastal Act.~~

**B. ~~De Novo CDP Number A-3-SLO-14-0021 Determination Approving Single-Family Residence as Conditioned~~**

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

~~**Motion:** I move that the Commission **approve** Coastal Development Permit A-3-SLO-14-0021 pursuant to the staff recommendation, and I recommend a yes vote.~~

~~**Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-3-SLO-14-0021 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with San Luis Obispo County Local Coastal Program policies and Coastal Act access and recreation policies. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.~~

**C. ~~De Novo CDP Number A-3-SLO-11-055 Determination Denying Single-Family Residence~~**

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure to adopt the motion will result in denial of the CDP and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

~~**Motion:** I move that the Commission **approve** Coastal Development Permit Number A-3-SLO-11-055 pursuant to the staff recommendation, and I recommend a no vote.~~

~~**Resolution to Deny:** The Commission hereby denies Coastal Development Permit Number A-3-SLO-11-055, adopts the findings set forth below, on the grounds that the development does not conform with the policies of the San Luis Obispo County Local Coastal Program or with the Coastal Act's access and recreation~~

~~policies. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse effects of the development on the environment.~~

## II. STANDARD CONDITIONS

The permit **A-3-SLO-14-0021** is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

## III. SPECIAL CONDITIONS

Coastal development permit **A-3-SLO-14-0021** is granted subject to the following special conditions:

1. **Revised Project Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit two full size sets of Revised Project Plans to the Executive Director for review and approval. The Revised Project Plans shall be substantially in conformance with the approved project plans (see **Exhibit 2**) except that they shall be revised and supplemented to comply with the following requirements:
  - (a) **Development Footprint.** The revised project plans shall illustrate the development footprint, which shall include the footprint of the residence and garage, as well as the driveway. The development footprint shall be minimized to the maximum extent feasible. The footprint of the residence and garage shall be no larger than 1,650 square feet. The driveway shall be no wider than 20 feet, and shall be the minimum distance necessary to connect the garage to the street. The development footprint shall be located as far to the

west of the property as possible, abutting San Leandro Court, as shown on Exhibit 8, while taking into account LCP-required property setbacks.

**(b) Lighting.** There shall be no exterior night lighting, other than the minimum lighting necessary for pedestrian and vehicular safety purposes. All lighting shall be downward directed and designed so that it limits the amount of light or glare visible from the habitats on the property and adjacent to the property to the maximum extent feasible, including through directing all interior lighting away from windows to the maximum extent feasible. Lighting plans shall be submitted with documentation associated with chosen lighting features demonstrating compliance with this condition.

**(c) Site Maintenance.** All site maintenance activities, including those associated with maintaining landscaping and/or restored site areas, shall be clearly identified, and shall only be allowed consistent with the terms and conditions of this coastal development permit.

All requirements above and all requirements of the approved Revised Project Plans shall be enforceable components of this coastal development permit. The Permittee shall undertake development in accordance with the approved Revised Project Plans.

**2. Habitat Restoration Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit two sets of a Habitat Restoration Plan to the Executive Director for review and approval. The plan shall at a minimum include:

**(a) Restoration Area.** A detailed site plan of all restoration areas with habitat acreages identified shall be provided, based on Exhibit 8, where the objective is to maximize biological value in relation to the terrestrial habitats on and adjacent to the property.

**(b) Baseline.** The ecological assessment of the current condition of the restoration and mitigation areas.

**(c) Success Criteria.** Goals, objectives, and performance standards for successful restoration and mitigation.

**(d) Restoration Methods.** The final design and construction methods that will be used to ensure the habitat plan achieves the defined goals, objectives, and performance standards.

**(e) Initial As Builts.** Provisions for submittal, within 30 days of completion of initial restoration and mitigation work, of “as built” plans demonstrating that initial restoration and mitigation area activities have been completed in accordance with the approved plan.

**(f) Monitoring and Maintenance.** For each habitat type, provisions for monitoring and maintenance, including a schedule, maintenance activities, a quantitative sampling plan, fixed photographic points, interim success criteria, final success criteria for native and non-native vegetative cover, biodiversity and wetland hydrology, and a description of the method by which success will be evaluated.

**(g) Reporting.** Provision for submitting, for the review and approval of the Executive Director, monitoring reports prepared by a qualified specialist that assess whether the restoration is in conformance with the approved plan, beginning the first year after initiation of implementation of the plan, and annually for at least five years. Final monitoring for success will take place no sooner than 3 years following the end of all remediation and maintenance activities other than weeding. If the final report indicates that the restoration project has been unsuccessful, in part or in whole, based on the approved success criteria, the Permittee shall within 90 days submit two sets of a revised or supplemental restoration program for the review and approval of the Executive Director. The revised or supplemental restoration program shall be processed as an amendment to the coastal development permit unless the Executive Director determines that no permit amendment is required. The program shall be prepared by a qualified specialist, and shall be designed to compensate for those portions of the original restoration that did not meet the approved plan's success criteria.

All requirements above and all requirements of the approved habitat plan shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with this condition and the approved habitat restoration plan.

- 3. Landscape Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit two sets of a Landscape Plan to the Executive Director for review and approval. The plan shall identify all plant materials (size, species, quantity, etc.), all irrigation systems, and all proposed maintenance measures, including providing for vegetation as necessary to achieve required screening. The plan shall be in conformance with and complimentary to the Habitat Restoration Plan identified in **Special Condition 2**, using native vegetation. All plant materials shall be native and non-invasive species selected to be complimentary with the mix of native species in the project vicinity, prevent the spread of exotic invasive plant species, and avoid contamination of the local native plant community gene pool. All landscaped areas shall be continuously maintained by the Permittee; all plant material shall be continuously maintained in a litter-free, weed-free, and healthy growing condition, and shall be replaced as necessary to maintain compliance with this CDP. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be so identified from time to time by the State of California, and no plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be planted or allowed to naturalize or persist. All requirements above and all requirements of the approved Landscape Screening Plan shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with the approved Landscape Plan.
- 4. Construction Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit two sets of a Construction Plan to the Executive Director for review and approval. Minor adjustments to the following construction requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources. The Construction Plan shall, at a minimum, include the following:

- (a) **Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, all storage areas, all construction access corridors (to the construction site and staging areas), and all public pedestrian access corridors. All such areas within which construction activities and/or staging are to take place shall be minimized to the maximum extent feasible in order to minimize construction encroachment on sensitive habitats and public use areas and to have the least impact on coastal resources, including public access, overall.
- (b) **Construction Methods and Timing.** The Construction Plan shall specify the construction methods to be used, including all methods to be used to keep the construction areas separated from sensitive habitat and public recreational use areas. All erosion control/water quality best management practices to be implemented during construction and their location shall be noted. The timing/work seasons restrictions for the various construction components shall be limited from 7am to 6pm, Monday through Friday, and 9am to 5pm on Saturday. Construction operations shall be prohibited on Sunday and any national holiday.
- (c) **Morro Shoulderband Snail Protection.** To reduce the potential adverse impacts from project construction, the following protective measures shall be included in the Construction Plan.
1. The plan shall include pre-construction surveys for the Morro shoulderband snail. If this species is identified in the project impact area, the Permittee shall consult with the biological monitor, the U.S. Fish and Wildlife Service and the Executive Director, and shall implement mitigation measures as directed by the Executive Director. The Permittee shall apply for an amendment to this CDP to implement such mitigation measures if the Executive Director determines that an amendment is legally required.
  2. Before any construction activities begin, a qualified biologist shall conduct a training session for all construction personnel. At a minimum, the training shall include photographs of the Morro shoulderband snail, a description of the species and its habitat, the importance of the species and its habitat, the general measures that are being implemented to protect the species as they relate to the project, and the parameters within which the project may be accomplished. Personnel shall also be instructed on the penalties for not complying with avoidance and minimization measures. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work.
  3. All construction work areas and material and vehicle storage areas shall be surrounded with a barrier capable of preventing entry into the work area by the Morro shoulderband snail.
  4. A qualified biologist shall be on-site during all initial ground disturbance and removal of vegetation material at the work site and will survey the work site at those times, including material and vehicle storage areas and the protective barriers installed around construction and storage areas. The biologist, or a representative that the biologist has designated and trained, shall survey the work site and animal barriers each day prior to the beginning of construction activities. If Morro shoulderband snail

is found within the work area, all development within the affected area shall cease until after the biologist or trained representative contacts the U.S. Fish and Wildlife Service and consults as to the required course of action.

5. All construction-related holes shall be covered to prevent entrapment of the Morro shoulderband snail.
6. Plastic mono-filament netting or similar material shall not be used at the project site because the Morro shoulderband snail may become entangled or trapped in it. Acceptable substitutes include coconut coir matting or tackified hydro-seeding compounds.

**(d) Construction Requirements.** The Construction Plan applies to initial construction as well as future maintenance. The Construction Plan shall include the following construction requirements specified by written notes on the Construction Plan.

1. Prior to the commencement of any development authorized under this CDP, the Permittee shall ensure that all on-site workers and contractors understand and agree to observe the standards for work outlined in this CDP and in the detailed project description included as part of the application submittal as revised by these conditions.
2. Prior to commencement of ground-disturbing activities, erosion, sediment, and runoff control measures shall be deployed in accordance with the final Storm Water Pollution Prevention Plan approved pursuant to **Special Condition 5**, and all measures shall be properly maintained throughout the duration of construction activities.
3. Prior to the commencement of construction, the limits of the work areas and staging areas shall be delineated in consultation with a qualified biologist, limiting the potential area affected by construction and ensuring that all habitats adjacent to construction areas are avoided during construction. All vehicles and equipment shall be restricted to pre-established work areas and haul routes and to established or designated staging areas.
4. All trash shall be properly contained, removed from the work site, and disposed of on a regular basis to avoid contamination of habitat during construction activities. Any debris inadvertently discharged into coastal waters shall be recovered immediately and disposed of consistent with the requirements of this CDP.
5. Topsoil removed by grading operations shall be stockpiled for reuse and shall be protected from compaction and wind or erosion during stockpiling.
6. Equipment staging, materials storage, and stockpiling areas shall be limited to the locations and sizes specified in the approved construction plans. Construction vehicles shall be restricted to designated haul routes. Construction equipment and materials shall be stored only in designated staging and stockpiling areas as depicted on the approved construction plans.

7. Any fueling and maintenance of construction equipment shall occur within upland areas outside of habitat areas or within designated staging areas. Mechanized heavy equipment and other vehicles used during the construction process shall not be refueled or washed within 100 feet of streams.
8. Fuels, lubricants, and solvents shall not be allowed to enter coastal waters, riparian areas or wetlands. Hazardous materials management equipment including oil containment booms and absorbent pads shall be available immediately on-hand at the project site, and a registered first-response, professional hazardous materials clean-up/remediation service shall be locally available on call. Any accidental spill shall be rapidly contained and cleaned up.

All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with this condition and the approved Construction Plan.

- 5. Final Storm Water Pollution Prevention Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit two sets of a final Storm Water Pollution Prevention Plan (SWPPP) to the Executive Director for review and approval. Minor adjustments to the following requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources. The final SWPPP shall include provisions for all of the following:

- (a) **Sedimentation Controlled.** Runoff from the project site shall not increase sedimentation in coastal waters or wetlands post-construction. During construction, runoff from the project site shall not increase sedimentation in coastal waters beyond what is allowable under the final Water Quality Certification approved for the project by the Regional Water Quality Control Board.
- (b) **Pollutants Controlled.** Runoff from the project site shall not result in other pollutants entering coastal waters or wetlands during construction or post-construction.
- (c) **BMPs.** Best Management Practices (BMPs) shall be used to prevent the entry of polluted stormwater runoff into coastal waters and wetlands during construction and post-construction, including use of relevant BMPs as detailed in the current California Storm Water Quality Best Management Handbooks (<http://www.cabmphandbooks.com>).
- (d) **Spill Measures.** An on-site spill prevention and control response program, consisting of BMPs for the storage of clean-up materials, training, designation of responsible individuals, and reporting protocols to the appropriate public and emergency services agencies in the event of a spill, shall be implemented at the project to capture and clean-up any accidental or other releases of oil, grease, fuels, lubricants, or other hazardous materials, including to avoid them entering coastal waters or wetlands.
- (e) **BMP Schedule.** A schedule for installation and maintenance of appropriate construction source-control BMPs to prevent entry of stormwater runoff into the construction site and to prevent excavated materials from entering runoff leaving the construction site.

All requirements above and all requirements of the approved SWPPP shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with this condition and the approved SWPPP.

- 6. Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the property governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description and graphic depiction, prepared by a licensed surveyor, of the property governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the property.

**7. Open Space Restriction**

- (a) No development, as defined in Section 30106 of the Coastal Act, shall occur outside of the Development Footprint approved by the Executive Director pursuant to Special Condition 1, except for habitat restoration and landscaping allowed pursuant to Special Conditions 2 and 3, stormwater runoff and erosion control measures allowed pursuant to Special Condition 5, and the septic system allowed pursuant to Special Condition 10.
- (b) PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOTICE OF INTENT TO ISSUE COASTAL DEVELOPMENT PERMIT NO. A-3-SLO-14-0021, the Applicant shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal metes and bounds legal description and corresponding graphic depiction drawn to scale and prepared by a licensed surveyor of the portions of the subject property affected by this condition, as generally described above and shown in the Revised Plans that have been approved by the Executive Director pursuant to Special Condition 1.
- 8. County Conditions.** All conditions of approval imposed on the project by San Luis Obispo County pursuant to an authority other than the California Coastal Act remain in effect, but do not alter the Permittee's responsibility to satisfy all conditions of approval as specified herein. The Permittee shall be responsible for satisfying all terms and conditions of this coastal development permit in addition to any other requirements imposed by other local conditions.
- 9. Utilities**
- (a) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit, for the review and approval of the Executive Director, evidence that Golden

State Water Company will serve the property with water, and evidence that a septic system, adequate to serve the proposal, can be installed on the site, outside of the habitat restoration areas required pursuant to Special Condition 2.

- (b) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit, for the review and approval of the Executive Director, evidence that the Applicant has retrofitted enough existing homes and/or businesses to save twice the amount of water the new residence will use.

**10. Lot Unification.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit to the Executive Director for review and approval documentation demonstrating that the Applicant has executed and recorded against parcels APN 074-483-025 and APN-074-022-042 a deed restriction, in a form and content acceptable to the Executive Director: (1) prohibiting all development on parcel APN-074-022-042, except habitat restoration or any other development dependent on the environmentally sensitive habitat area on-site; and (2) requiring that parcels APN-074-022-042 and APN-074-482-025 have been legally tied together so that they are treated as a single parcel pursuant to applicable State and Local statutes. The tied properties shall be held as a single building site for purposes including, but not limited to, sale, conveyance, development, or encumbrance. The deed restriction shall include a legal description of the entire parcels governed by this permit.

#### IV. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

##### A. Project Location

The projects include construction of two single-family residential developments on two adjacent undeveloped parcels located between Sea Horse Lane and San Leandro Court in the southwest portion of the community of Los Osos, which is directly south of Morro Bay in San Luis Obispo County. The eastern lot (from hereon referred to as “Sea Horse Lane Parcel”) is approximately 5 acres (5.08-acres), and the western lot (from hereon referred to as “San Leandro Court Parcel”) is approximately one-half-acre (0.45-acre). The San Leandro Court Parcel is located at 286 San Leandro Court in the neighborhood of Cabrillo Estates. The Sea Horse Lane Parcel is located west of Seahorse Lane, approximately 1,000 feet south of Highland Drive. The San Leandro Court Parcel is in the Local Coastal Program’s (LCP) Single-Family Residential land use category, and is bordered by other parcels zoned Single-Family Residential, except for the eastern-bordering parcel, the Sea Horse Lane Parcel. The Sea Horse Lane Parcel is in the LCP’s Residential Suburban land use category, which allows single-family residences with incidental agricultural uses. The Sea Horse Lane Parcel is adjoined by single-family residences and horse riding/boarding facilities interspersed with undeveloped land.

See **Exhibit 1** for location maps and photos of the project area.

## **B. Project Description**

The development approved on the San Leandro Court Parcel (one-half-acre) is the construction of a two-story 5,000 square-foot single-family residence with attached garage, a driveway, and related residential development improvements, including a septic system and landscaping (from hereon referred to as “San Leandro Development”). As approved by the County, the San Leandro Development would impact the entire one-half-acre lot.

The development proposed on the Sea Horse Lane Parcel (5-acre) is the construction of a two-story 11,412 square-foot single-family residence with an attached 968 square-foot garage (a total residence/garage structure of roughly 12,400 square feet), a driveway, and related residential development improvements (i.e., septic system, patios, decks, retaining walls, landscaping, etc.) (from hereon referred to as “Sea Horse Lane Development”). The footprint of the Sea Horse Lane Development would be approximately three-quarters of an acre and would primarily be located in the middle of the parcel.

The mitigation for the impacts of both the San Leandro Court and the Sea Horse developments consists of placing approximately 4.27 acres of the Sea Horse Lane Parcel into two easements: an approximately 3.82-acre conservation easement for Morro shoulderband snail habitat protection, and a 0.45-acre open space easement. The open space easement would be directly south of the proposed 12,400 square-foot residence, and primarily for the purpose of planting of oaks and manzanitas onsite. The two easements would completely surround the development footprint of the proposed residence.

See **Exhibit 2** for development plans.

## **C. Project Background**

Applicant Thomas Kellaway (“Applicant”) purchased the approximately one-half-acre San Leandro Court Parcel in August 1998. Then, in January 1999, the Applicant purchased the approximately 5-acre Sea Horse Lane Parcel. On March 24, 2000, the Applicant applied for a Minor Use Permit/CDP from the County for development of a ‘single-family residence with driveway’ on a ‘5.46-acre site’ (i.e. both parcels together), with the proposed single-family residence located on the Sea Horse Lane Parcel and driveway access taken across the San Leandro Court Parcel. The development plan was subsequently revised to include two single-family residences, one on each parcel.

On June 24, 2010, the ‘*Low-Effect Habitat Conservation Plan for Federally endangered Morro shoulderband snail on the Kellaway Property, Los Osos*,’ (“Kellaway HCP”) was prepared for both parcels.<sup>1</sup> On July 1, 2011, San Luis Obispo County approved a Minor Use Permit/CDP (Number D9903360P) for the Sea Horse Lane Development of an approximately 12,400 square-foot single-family residence. The Coastal Commission’s Central Coast District Office received notice of the County’s approval on July 21, 2011. On August 4, 2011, the Commission (Commissioners Brennan and Stone) appealed the County’s approval of the project within the ten-day working period allowed for appeals to the Commission. The grounds for the appeal were that the County-approved development raised a substantial issue with regard to certified LCP

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<sup>1</sup> See Appendix #2.

policies that require preservation and protection of environmentally sensitive habitat areas (“ESHA”); including, ESHA Policies 1, 2, 29, 30, and Coastal Zone Land Use Ordinance (“CZLUO”) §§ 23.07.170 and 23.07.176.<sup>2</sup> The texts of these LCP policies are provided in **Exhibit 3**.

On September 9, 2011, the Commission determined the appeal of the County-approved residential project raised substantial LCP conformance issues with respect to ESHA. Specifically, the Commission found the County’s approval of a residential development on a 5-acre parcel that the County determined was entirely ESHA was inconsistent with the LCP policies that limit development within ESHA to those uses dependent on the resource. The Commission’s specific substantial issue findings are summarized below in **Section IV-E** and the complete text of the findings is in Exhibit 6. At the 2011 substantial issue hearing, the Commission informed the Applicant that he would need to provide information necessary for a takings analysis. In finding a substantial issue with the County’s decision, the Commission asserted jurisdiction over the CDP for the proposed Sea Horse Lane Development on the 5-acre parcel.

On March 29, 2012, Commission staff issued a letter to the Applicant asking for specific information related to takings. On January 6, 2014 the Commission’s Central Coast District office received some of the requested information from the Applicant. There is no statutory deadline for Commission action on the CDP application for the Sea Horse Lane development.

On March 12, 2012, the Applicant conveyed ownership of the one-half-acre parcel to 7 Tracks Realty Trust, of which the Applicant (Thomas Kellaway) is the named contact. On March 21, 2014 the County Planning Commission approved a Minor Use Permit/CDP (Number D010041P) for the construction of a 5,000 square-foot house on the one-half-acre San Leandro Court Parcel. On April 9, 2014, the Commission’s Central Coast District office received notice of the County’s decision. On April 23, within the ten-day working period allowed for appeals to the Commission, the Commission (Commissioners Bochco and Shallenberger) appealed the County’s approval. Similar to the appeal of the Sea Horse Lane Development, the grounds for the appeal were that the County-approved San Leandro Court Development was inconsistent with certified LCP policies that required preservation and protection of ESHA. The appellant’s complete appeals contentions are provided in **Exhibit 5**. The 49-day hearing deadline for the Commission to determine whether the County’s approval of the San Leandro Court Development raises a substantial issue is **June 11, 2014**.

#### **D. Appeals Procedures**

Coastal Act § 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

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<sup>2</sup> The San Luis Obispo LCP is composed of three main documents: (1) the Land Use Element, which includes specific area plans, including the Estero Plan which provides specific development policies for Los Osos; (2) the Coastal Plan Policies document, which provides general coastal policies (here, for example, referred to as ESHA Policy 1, or Public Works Policy 1); and (3) the Coastal Zone Land Use Ordinance (CZLUO), which implements many of the Coastal Plan Policies.

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. In this case, both projects are appealable because they involve development that is located between the sea and the first public road paralleling the sea.

The grounds for appeal under § 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 the *de novo* portion of the hearing on an appealed project unless a majority of the Commission finds that “no substantial issue” is raised by such allegations. Under § 30604(b), if the Commission considers the CDP *de novo* 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, § 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. These projects are located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission approves the projects following a *de novo* hearing.

The only persons qualified to testify before the Commission on the substantial issue question are the Applicants (or their representatives), 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.

#### **E. Summary of Commission’s Substantial Issue Determination for the Sea Horse Lane Development (A-3-SLO-11-0055)**

To briefly summarize the Commission’s substantial issue determination in **A-3-SLO-11-0055**, the Commission found that the County’s approval decision of the Sea Horse Lane Development raised a substantial LCP conformance issue because it allowed for a non-resource dependent use, a residential use, within ESHA. The County’s certified-LCP specifically provides that only resource-dependent uses are allowed within ESHA (CZLUO § 23.07.170; ESHA Policies 1, and 29). Refer to **Exhibit 6** for the complete text of the Commission’s substantial issue determination.

In its substantial issue determination findings, the Commission further determined that the County-approved development was not consistent with the LCP policy that allows for development within an ESHA to avoid a takings (CZLUO § 23.07.170(e)(2)).<sup>3</sup> The Commission

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<sup>3</sup> In an email sent to Commission staff after the Commission had appealed the Sea Horse Lane development, the County’s position was that approval was done consistent with CZLUO § 23.07.170(e)(2), the LCP policy allowing for development within ESHA to avoid a takings.

explained that not only did the County not mention, let alone analyze, the Sea Horse Lane development's consistency with the LCP takings avoidance standards in its findings, but the County did not address the threshold issue of whether denial of a CDP would result in a takings. Moreover, even if the County had provided the appropriate taking analysis, the Commission expressed concern that proposed project's scale and siting would not have been consistent with the LCP taking avoidance policy. More specifically, the proposed project, the Commission stated, was not the least amount necessary to avoid a taking, and would not avoid ESHA impacts to the maximum extent feasible, as the proposed development was not sited in the least sensitive portion of the parcel. Absent such an analysis and conclusion, the Commission stated, the project was categorically inconsistent with the LCP policy relating to taking avoidance in ESHA.

In sum, the Commission found that the residential project raised substantial LCP conformance issues because the proposed residential project was located within ESHA, and therefore was inconsistent with the LCP requirement of limiting development within ESHA to resource-dependent uses. The Commission also stated that the Applicant would need to provide information related to a potential taking of private property, including an alternative analysis, before the Commission would review the proposed project at a *de novo* CDP hearing.

Because the Commission found that a substantial issue existed, the Commission asserted jurisdiction over the CDP application for the proposed project. Accordingly, the proposed development is reviewed *de novo* below.

## **F. Substantial Issue Determination for the San Leandro Court Development (A-3-SLO-14-0021)**

### **1. Substantial Issue Factors**

The Commission's regulations indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (California Code of Regulations, Title 14, § 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors in making such determinations: (1) 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; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. Even where the Commission chooses not to hear an appeal, Appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, § 1094.5.

### **2. Substantial Issue Analysis**

Like the appellants' contentions described above regarding the Sea Horse Lane development on the adjacent 5-acre parcel, the appellants contend that the County's CDP decision is inconsistent with certified LCP policies requiring the preservation and protection of ESHA (including ESHA Policies 1, 2, 29, 30, and 35; CZLUO §§ 23.07.170 & 23.07.176). For the full text of those LCP policies see **Exhibit 3**, and for the appellant's full appeal contentions see **Exhibit 5**.

In its approval, the County found that the entire, approximately one-half-acre, development site is unmapped Terrestrial Habitat ESHA due to the presence of the Morro shoulderband snail (*Helminthoglypta walkeriana*), which is listed as endangered pursuant to the federal Endangered Species Act of 1973, 16 U.S.C. 1531 et. seq., as amended. CZLUO § 23.11.030 defines ESHA as a sensitive resource area “where plant or animal life or this habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed by human activities and development,” this includes, “...areas commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection.” The County approved this proposed development on the basis that the applicant would have a federal Incidental Take Permit, and consequently be subject to the Kellaway HCP, which includes a 3.82-acres conservation easement.

The LCP requires the preservation and protection of Terrestrial Habitat ESHA, and emphasizes the protection of the entire ecological community over individual plants and/or animals (CZLUO § 23.07.176). When Terrestrial Habitat ESHA is determined, as the County did in this case, use and development in such areas is limited to only that associated with those uses that are dependent on the ESHA resource, and only where such use and development does not result in significant disruption to the ESHA (as provided by ESHA Policies 1, 29; and CZLUO § 23.07.170). In this case, the County-approved project allows for a residential use, not a resource-dependent use, within what the County determined to be ESHA. Consequently, the County’s approval of the proposed residential development directly conflicts with the LCP use limitations within ESHA. Thus, the County-approved development raises a substantial LCP conformance issue.

Furthermore, because application of the LCP generally requires denial of proposed non-resource dependent developments within ESHA, which may lead to an unconstitutional taking of private property, the LCP provides a process for a limited exception that allows for inconsistent development within ESHA to avoid takings. In this case, however, the County did not address the LCP’s taking avoidance exception to the general rule allowing only resource-dependent uses within ESHA.

If the County had addressed takings, it would have had to first determine whether denial of the proposed development would have likely resulted in an unconstitutional taking, which requires analyzing the proposed development with the applicable judicially created constitutional tests. Only after applying those constitutional tests to the facts in this case and determining that denial of the proposed development would result in a taking, would then the taking avoidance standards of CZLUO § 23.07.170(e)(2) be applicable. Section 23.07.170(e)(2) provides mandatory taking avoidance standards that require development to be consistent with the following: (i) the amount and type of development must be the least necessary to avoid a taking; (ii) all development in and impacts to ESHA must be avoided to the maximum extent feasible, and any unavoidable impacts shall be limited to the maximum extent feasible; and (iii) all adverse impacts to the ESHA must be fully mitigated. If the County intended the approval of this proposed development within ESHA pursuant to this LCP ESHA taking avoidance policy, then the development would have to be consistent with these mandatory standards. A 5,000 square-foot residential development that would impact the entire one-half-acre parcel would not be the least amount of development necessary to avoid a taking; and it would not avoid, or limit impacts to

ESHA to the maximum extent feasible. As for mitigating all impacts to ESHA, the proposed development may be consistent because it would require a 3.82-acre conservation easement, and included within that easement is the enhancement of 0.24-acre of Morro shoulderband snail habitat. However, that mitigation is required by the Kellaway HCP, which provides mitigation for the impacts caused by the construction of both single-family residences on the two adjacent parcels, not just the San Leandro Court Development.

The County's approval of a residential development, a non-resource dependent use, raises a substantial LCP conformance issue because it is without adequate factual or legal support. In addition, the County's action has the potential to prejudice future action and interpretation with respect to development within ESHA. To allow non-resource dependent development within ESHA, the County must make the requisite findings, applying the facts of the proposed development to the takings analysis and to the LCP ESHA taking avoidance standards. Absent such findings, the County's approval raises a substantial issue of conformance with the LCP. Protecting ESHA is one of the most fundamental aspects of the LCP, and the Coastal Act. Proposed development that will result in the loss of ESHA or otherwise impacts ESHA demands a thoughtful and step-by-step evaluation to ensure that proposed developments are consistent with the applicable ESHA policies.

Thus, the County-approved development of a 5,000 square-foot single-family residence on an approximately one-half-acre parcel raises a substantial LCP conformance issue. Accordingly, the Commission asserts jurisdiction over the CDP application for the proposed San Leandro Court Development.

## **G. Coastal Development Permit Determinations**

In this section, the *de novo* review of the proposed CDP applications, a summary of the applicable LCP policies are introduced by category and followed by application of those policies to each development: first applied to the proposed Sea Horse Lane Development (12,400 square-foot single-family residence on the approximately 5-acre parcel, **A-3-SLO-11-055**); and then applied to the proposed San Leandro Court Development (5,000 square-foot single-family residence on the one-half-acre parcel, **A-3-SLO-14-0021**). The standard of review is the San Luis Obispo County certified LCP, and the public access and recreation policies of the Coastal Act.

### **1. Summary and Background of LCP Water Supply Resource Policies**

The certified County-LCP provides a series of development restrictions aimed at ensuring that adequate public services support efficient and orderly growth of the community. This includes ensuring that essential resources, such as water supply, are available to serve new development. See **Exhibit 3** for the complete text of applicable LCP policies. CZLUO § 23.04.430 (which implements Public Works Policy 1) expressly states that priority is given to development proposed inside the Urban Services Line (USL) over development proposed between the USL and the Urban Reserve Line (URL). The Sea Horse Lane Parcel is between the USL and the URL, and the San Leandro Court parcel is inside the USL.

The reason for prioritizing USL development is to support orderly growth and protect priority uses of essential public services. As explained in the LCP, the URL represents the ultimate limits

for community growth based upon both the needs of individual communities for areas of additional growth, as well as the capacities of community resources to support such growth. Put differently, the LCP characterizes the area between the USL and the URL as “holding zones” where development of designated uses (in this case Residential Suburban) would be appropriate only after areas within the USL have been developed, and when there are adequate services and facilities to accommodate such development, and the area is amended into the USL.

In comparison, the USL encompasses the area in which urban services are currently provided, and placement of the USL is based upon existing service system capacities, upon community plans, the Coastal Act requirements for orderly growth consistent with available services, and natural resource constraints. The USL and the URL are further interned to ensure that the amount of new development within them does not preclude the provision of adequate public services to Coastal Act priority uses (i.e., coastal dependent development, agriculture, visitor-serving, and recreation uses). The LCP identifies the USL as the Urban-Rural boundary. Limiting public services to areas within the USL is a critical component of the LCP, used to effectively maintain the urban/rural boundary, which is an essential mechanism for protecting coastal resources, such as groundwater basins. In Los Osos, one of the critical constraints on additional growth is the limited water supply.

The County’s IP, in CZLUO § 23.04.430, establishes two standards for assessing adequacy of public services for new development: (1) a general standard for new development; and (2) a higher standard for new development in a community with limited water service capacities as defined by Resource Management System alert levels II and III.

The LCP describes the Resource Management System (“RMS”) alert levels as serving to facilitate planning by allowing communities to anticipate resource needs and the County to take action to protect communities’ economic interests, public health and safety, and the long-term availability of essential resources, including the water supply. The RMS specifically protects the water supply by identifying water resource limits and carrying capacities for the communities, and by monitoring the water supply capacity to provide communities with adequate potable water.<sup>4</sup> The LCP defines Alert level III as “when the capacity (maximum safe yield) of a resource has been met or exceeded. At level III there is a deficiency of sufficient magnitude that drastic actions may be needed to protect public health and safety.” The LCP provides more specific definitions based on the two water supply criteria. For ‘water resources,’ the LCP states: “A Level of Severity III exists when water demand equals the available resource; the amount of consumption has reached the dependable supply of the resource.” For ‘water systems,’ the LCP states: “Level III exists for a water supply system when water demand equals available capacity, in this case when a water distribution system is functioning at design capacity, or will be functioning at capacity before improvements can be made. The capacity of a water system is the design capacity of its component parts: storage, pipelines, pumping stations and treatment plants.” In short, a community water supply can be limited under the RMS by either: (1) exceeding water demand of the source; or (2) inadequacy of the water supply system (i.e., infrastructure).

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<sup>4</sup> Coastal Zone Framework for Planning pg. 3-2.

Under the first standard of CZLUO § 23.04.430, which applies to both the Sea Horse Lane Development and the San Leandro Court Development, the LCP prohibits the applicable approval body from approving a CDP for any new development, unless it is demonstrated that there is adequate water and sewage disposal capacity available to serve the proposed development. The second, higher standard applies only to the Sea Horse Lane Development, because it is located outside of the USL, and because Los Osos is at RMS Level III for water.

Under the higher standard, when a community has limited water supply or sewage (i.e., alert level II or III), in order for new development to be compliant with the LCP it must satisfy subsections (a) and (b). Under subsection (a), new development proposed between the USL and the URL shall not be approved unless it is demonstrated that “capacities of available water supply and sewage disposal services are sufficient to accommodate both existing development, and allowed development on presently-vacant parcels within the [USL].” Subsection (b) states that new development proposed outside of the USL shall only be approved if it can be served by adequate on-site water and sewage disposal systems, with a narrow exception for single-family residences located adjacent to a parcel that is eligible to connect to the community water system, and so long as lateral connection can be accomplished without a trunk line extension. As explained below, the Sea Horse Lane development proposes to connect to the community water service via a connection extended from the San Leandro Court parcel, through the western end of the Sea Horse Lane parcel.<sup>5</sup>

Finally, CZLUO § 23.04.432 mandates that development requiring a new community water extension beyond the USL shall not be approved.

In sum, CZLUO §§ 23.04.430 and 23.04.432 implement the fundamental goals expressed in the LCP, ensuring the protection of coastal resources by concentrating new development within the existing developed area of the USL, and ensuring that all new development has adequate services available to serve it.

## ***2. Water Supply Resources Analysis for Proposed Sea Horse Lane Development (A-3-SLO-11-055)***

### **a. The LCP Requires Denial of the Sea Horse Lane Development Because It is located In Between the Urban Services Line and the Urban Reserve Line And It Cannot Be Demonstrated that the Los Osos Water Supply is Adequate to Support Existing Demand and All LCP Prioritized Development.**

The proposed Sea Horse Lane Development would obtain water from the Golden State Water Company through the community water system. As explained above, CZLUO § 23.04.430 establishes two standards: (1) a general standard for new development; and (2) a higher standard for new development outside the USL, in a community with limited water service capacities as defined by RMS alert levels II and III. In Los Osos, the County has designated both the water supply and the sewage disposal at alert level III. Here, the proposed development, as explained in more detail below, is allowed to use a septic system and therefore the development consistency

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<sup>5</sup> Personal communications with Applicant’s agent Bob Semonsen on 4/29/14.

with the sewage disposal component of this policy is not an issue. Instead, the issue is the Los Osos capacity of available water supply. As explained in the previous section, capacity of available water supply refers to both the community's water demand on the supply source, and the capacity for the water supply system (i.e., infrastructure) to deliver. The former criterion is the reason for the County's designation of level III in Los Osos; the community's water supply source, the Los Osos Groundwater Basin, is at level III because water extractions from the basin exceed safe yield.

Because the Los Osos Groundwater Basin ("the Basin") is at alert level III, the proposed new development must satisfy subsections (a) and (b) of § 23.04.430. Subsection (a) prohibits approval of new development proposed between the USL and the URL unless it is demonstrated that capacities of available water supply are sufficient "to accommodate both existing development, and allowed development on presently-vacant parcels within the [USL]." The Sea Horse Lane parcel is located in between the Los Osos USL and URL boundary lines (refer to **Exhibit 4** for the LCP Los Osos USL-URL map). Thus, the proposed Sea Horse Lane Development must meet the standard of subsection (a).

The best available scientific data regarding safe yield of the Basin indicates that there is inadequate water supply to accommodate both existing demand and all development that would be allowed on presently vacant parcels within the USL. The County has designated the Los Osos water supply at alert level III because current water extractions from the community's water supply source, the Los Osos groundwater basin, exceed safe yield. Safe yield, also referred to as 'sustainable yield', is the amount of water that can be extracted from the basin without potentially adversely impacting the long-term health of the basin. According to the 2013 Draft Basin Plan for the Los Osos Groundwater Basin ("the Basin Plan"), groundwater production from the basin has been unsustainable since the late 1970s, and despite significant efforts to reduce water withdrawals, the basin continues to be over-pumped today. The Basin Plan was prepared by San Luis Obispo County and the three water purveyors in Los Osos—Los Osos Community Services District, Golden State Water Company, and S&T Mutual Water Company—as part of an adjudication of water resources in the Basin. According to the Basin Plan, the total production from the groundwater basin in 2012 was 2,610 acre-feet, in excess of the Basin Plan's estimated sustainable yield for that year, of 2,450 acre-feet.<sup>6</sup> The LCP's Estero Plan, which was certified by the Commission in 1988, estimated safe yield between 1300 and 1800 acre-feet per year. Under either estimate, the groundwater basin is being overdrafted. This is of particular concern in light of the LCP and Coastal Act policies that specifically require the preservation and protection of groundwater basins.<sup>7</sup>

A significant consequence of exceeding safe yield in the Basin is seawater intrusion, particularly in the Basin's lower aquifer. Seawater intrusion is another reason the County cited in its adoption of alert level III designation for the Basin. Seawater intrusion into the Basin occurs when, as the

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<sup>6</sup> See Appendix 1.

<sup>7</sup> See **Exhibit 3**: Selected San Luis Obispo County LCP Policies (LCP Coastal Watershed Policy 1: Preservation of Groundwater Basins. The long-term integrity of groundwater basins within the coastal zone shall be protected. The safe yield of the groundwater basin, including return and retained water, shall not be exceeded except as part of a conjunctive use or resource management program which assures that the biological productivity of aquatic habitats are not significantly adversely impacted. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD].)

Basin Plan explains, “[the] average static groundwater levels in the freshwater portion of the aquifer must be held higher than sea level. If freshwater levels fall below a certain level [as defined in the Basin Plan], then seawater will progress inland in order to equilibrate the pressures between seawater and freshwater portions of the aquifer.”<sup>8</sup> The Basin Plan identifies seawater intrusion as a critical challenge that threatens the long-term integrity of the Los Osos water supply.

The County determined that the capacities of available water supply service was “sufficient to accommodate both existing development, and allowed development on presently-vacant parcels within the [USL] because the applicant is required to retrofit existing development to result in a savings of 900 gallons of water per day,” which the County explained would offset the development’s water demand at a two-to-one ratio. Previously, so long as new development located *within* the USL offsets its water demand at a two-to-one ratio, as required by Title 19 of the County Municipal Code, both the County and the Commission have found that such development is consistent with the less stringent, general requirement of CZLUO § 23.04.430, requiring a finding there is adequate water capacity available to serve the proposed development. In such cases, the project would pay in-lieu fees to improve the water efficiency of existing development; and, therefore the result would be, in theory, no additional increase of water withdrawal from the basin. The critical difference in this case is that the Sea Horse Lane parcel is not within the USL and it must comply with the higher standard provided by subsection (a) of § 23.04.430.

As explained above, the higher standard laid out in CZLUO § 23.04.430(a) requires new development proposed between the USL and URL to demonstrate that capacities of available water supply are sufficient “to accommodate both existing development, and allowed development on presently-vacant parcels within the [USL].” County records show that there are approximately 577 presently-vacant developable parcels within the USL.<sup>9</sup> Thus, in addition to demonstrating that there is adequate water to serve the proposed development, the Sea Horse Lane development must also demonstrate there is adequate water to serve existing development within the USL, as well as allowable development on the 577 vacant developable parcels. Again, numerous existing data sources clearly show that the water supply that serves Los Osos is currently in overdraft, and therefore, it is not possible to demonstrate that there is adequate water to serve existing development within the USL, let alone to serve the 577 vacant developable parcels. Further, the County’s retrofit offset program for Los Osos is intended as an interim measure to accommodate development within, not outside of the USL, and the Los Osos offset program is not part of the County’s certified LCP.

Relating to the current status of new development within the Los Osos USL, at this time, the vast majority of the 577 parcels within the USL are under a *de facto* moratorium as a result of action by the Regional Water Quality Control Board (RWQCB). The RWQCB adopted a resolution prohibiting additional septic systems in a portion of Los Osos because the nitrate levels exceeded state standards (for that reason, the County also designates the Los Osos sewer system at alert level III). That action effectively halted new construction or major expansions of development

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<sup>8</sup> See Appendix 1 at pg. 98-99.

<sup>9</sup> See Appendix 4; See also **Exhibit 4b**.

until a community wastewater collection and treatment is constructed. The Sea Horse Lane Parcel is not located within the so-called “Prohibition Zone,” and consequently would be allowed to install the proposed septic system. At this time a wastewater treatment facility is currently under construction, and once completed it is expected to allow for development to proceed within the USL. Thus, new development proposals within the USL are expected once the treatment facility is completed, and the LCP gives such development priority to tap into the community’s water supply.

Evidence shows that the Los Osos water supply is, at this time, inadequate to meet the water demand of existing development, let alone adequate to support the approximately 577 presently-vacant parcels within the USL. As a result, the Sea Horse Lane Development is inconsistent with CZLUO § 23.04.430(a). As stated by Public Works Policy 1, which CZLUO § 23.04.430 implements, “lack of proper arrangements for guaranteeing service is grounds for denial of the project or for reduction of the density that could otherwise be approved consistent with available resources.” In this case, reduction of density would not render new development on the parcel consistent with subsection (a), therefore the LCP requires the Commission to deny the proposed development at this time. However, the Basin Plan provides numerous programs and measures aimed at achieving sustainable yield for the Basin that, once implemented, would allow the development proposed on the Sea Horse Lane Parcel, as well as development proposed on other similarly situated parcels, to satisfy the requirement of CZLUO § 23.04.430(a).<sup>10</sup>

**b. Even If the Proposed Sea Horse Lane Development Could Satisfy the CZLUO § 23.04.430(a) Standard, the Development Would Still Be Inconsistent With CZLUO § 23.04.430(b).**

Although the LCP requires CDP denial because the Sea Horse Lane Development is inconsistent with subsection (a), it is nevertheless important to analyze subsection (b) to provide future guidance. Subsection (b) states that new development proposed outside of the USL shall only be approved if it can be served by adequate on-site water and sewage disposal systems, with a narrow exception for single-family residences located adjacent to a parcel that is eligible to connect to the community water system, and so long as lateral connection can be accomplished without a “trunk line extension.” The purpose of this policy is to prohibit water supply systems (infrastructure) from extending beyond the USL in order to minimize conflict between rural and urban land uses. CZLUO § 23.04.432 complements this standard, providing a bright line rule that “development requiring new community water extension beyond the USL shall not be approved.”

As proposed, the Sea Horse Lane Development proposes to connect to community water provided by the Golden State Water Company. Because the LCP prohibits such an extension of community water services outside of the USL (per CZLUO § 23.04.432), and requires an adequate on-site supply (per CZLUO § 23.04.432(b)), the water supply proposed for Sea Horse Lane is inconsistent with the LCP on these points. At the same time, the LCP does provide a very narrow exception to this rule in Section 23.04.430(b). Specifically, and assuming that the Sea Horse Lane Development could, at some point in the future, be consistent with § 23.04.430(a),

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<sup>10</sup> See Appendix 1, Ch. 14.

the development would be required, pursuant to § 23.04.430(b), to be served by adequate on-site water unless it would be allowed to connect to a community water system under the narrow exception to that general rule. Specifically, under the exception, development of a single-family residence on an existing parcel may connect to community water services if: (i) such service exists adjacent to the subject parcel; and (ii) a lateral connection to provide such service can be accomplished without a “trunk line extension.” Here, the proposed development would be consistent with the first part of the test because it is a single-family residence. However, the Sea Horse Lane parcel is not adjacent to service in that the service is actually located within San Leandro Court, which is not adjacent to the Sea Horse Lane parcel. Rather, it is the adjacent San Leandro Court Parcel that is located adjacent to such service. Although the Applicant proposes connecting via the San Leandro Court parcel to the Sea Horse Lane parcel, the narrow LCP exception is not structured for such leap frog or ‘daisy chain’ extension of such services outside of the USL via a series of connected parcels. Rather, the plain language of the policy envisions a case where, for whatever reason, community service is found “adjacent to the subject parcel” (such as in an adjacent road). It is not envisioned to be where community service to an existing site allows for the same connection. In fact, the adjacent services in that latter case are not so much ‘community services’ as they are laterals from community services to other development, and connection to these laterals under the exceptions are not allowed under the LCP. In addition, in any case, the exception only allows connection when it can be done without a “trunk line extension.” Although this test need not be evaluated here given the lack of adjacency, an applicant would need to demonstrate that the single-family residence in question could connect to the water system without the extension of “trunk” lines to provide service. This issue was not evaluated by the County or the Applicant in its submittal, and thus it isn’t clear whether the Applicant’s proposal to use horizontal directional drilling to extend the water line from the San Leandro Court parcel across the western portion of the Sea Horse Lane parcel would constitute a “trunk line extension.” It is immaterial in this case, however, because the Sea Horse Lane Development cannot be served under the exception’s adjacency criteria in any case. In addition, any development of water lines on the property would have to be consistent with other LCP policies, such as the ESHA policies, before they could be approved in any case.

Thus, future development proposed on the Sea Horse Lane Parcel would be required to be serviced by adequate private on-site water, and it would need to be demonstrated that the private on-site water would be the environmentally preferable alternative (Public Works Policy 1). This would be problematic, at least at this time, because the Sea Horse Lane Parcel is located in the Western Area of the Los Osos Groundwater Basin, and would be extracting from the Basin’s lower aquifer. See map in **Exhibit 4b**. The Basin Plan expressly states that current water extractions from the Western Area of the lower aquifer need to be reduced in order to control seawater intrusion in the Groundwater Basin.<sup>11</sup> The Basin Plan explains that a reduction of water production from the lower aquifer in the Western Area “will allow freshwater levels to rise, thereby preventing further seawater intrusion and pushing the freshwater-seawater interface seaward and away from the Los Osos community.” Substantial uncertainty exists regarding the volume of water extracted from the lower aquifer in the Western Area due to the relatively high-frequency unmonitored private wells in that area. Compounding the problem is that the community water purveyors extract more from the lower aquifer due to the degraded quality of

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<sup>11</sup> See Appendix 1 at pg. 99.

the water in the Basin's nitrate-laced upper aquifer. Thus, residential development proposed on the Sea Horse Lane Parcel may face additional challenges accessing water even after it can satisfy the requirement of CZLUO § 23.04.430(a).

Despite these challenges, the County has identified a number of Basin Plan measures that, once effectively implemented, will improve water supply in Los Osos. Therefore, the Commission anticipates that adequate water will be available for residential development on the Sea Horse Lane Parcel in the future. In sum, the LCP requires the Commission to deny the proposed Sea Horse Lane Development at this time because the Los Osos water supply is currently inadequate. However, the Sea Horse Lane Parcel may be eligible for water service once the water supply in Los Osos improves enough that development on this parcel can meet the applicable LCP standards described above.

### ***3. Water Supply Resources Analysis for Proposed San Leandro Court Development (A-3-SLO-14-0021)***

While the San Leandro Court Development is still within an area designated as RMS III for water, the heightened standards of CZLUO § 23.40.430(a) and (b) do not apply to development within the USL, so this development must only meet the less stringent, general standard of this CZLUO section. See **Exhibit 4a** for a map of the Los Osos USL/URL boundary lines. The general standard states that new development must demonstrate that adequate water and sewage disposal capacity is available to serve the proposed development.

As explained in the previous section, water extractions from the Basin exceed safe yield, resulting in inadequate water supply capacity to support existing water demand in Los Osos. However, the proposed San Leandro Court Development, as conditioned by the County, would be required to retrofit existing water fixtures to offset its water demand at a ratio of two-to-one, consistent with Title 19 of the County Municipal Code. Although Title 19 is not part of the LCP and therefore not part of the standard of review here, compliance with this municipal code provision reduces existing water demand by reducing the water currently used by existing development. This allows for incremental development within the Los Osos USL while measures are implemented to bring the Basin into safe yield. Additionally, like the Sea Horse Lane Parcel, the San Leandro Court Parcel is not within the septic system "Prohibition Zone," therefore a septic system is allowed for the proposed development.

Thus, the proposed San Leandro Court development will be consistent with CZLUO § 23.04.430 with the adoption of **Special Condition 10**, which requires the San Leandro Court Development to offset its water demand at a two-to-one ratio in accordance with County law.

### ***4. Summary of Applicable LCP Environmentally Sensitive Habitat Area Policies***

The certified County-LCP contains numerous policies that protect, preserve and enhance ESHA. See **Exhibit 3** for complete text of LCP ESHA policies. CZLUO § 23.11.030 defines ESHA as "a type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development." The LCP specifically includes areas commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection within the definition of ESHA.

ESHA Policy 1 provides two development restrictions regarding ESHA. First, only resource-dependent uses shall be allowed within ESHA. Second, new development within or adjacent to locations of ESHA shall not significantly disrupt the resource. ESHA Policy 2 provides specific permit requirements that a development must conform to, such as demonstrating that there will be no significant impact on sensitive habitats, and that proposed development or activities will be consistent with the biological continuance of the habitat. ESHA Policy 29 emphasizes that protection for terrestrial habitat should be placed on the entire ecological community, and that only resource-dependent uses shall be permitted within the identified sensitive habitat portion of the site. ESHA Policy 29 also requires that development adjacent to ESHA shall be sited and designed to prevent impacts that would significantly degrade such areas and shall be compatible with the continuance of such habitat areas. ESHA Policy 30 provides that native trees and plant cover shall be protected wherever possible, and requires that native plants shall be used where vegetation is removed. ESHA Policy 35 provides protection of vegetation which serves as cover for endangered wildlife and must be protected against any significant disruption of habitat value, and requires that development be designed to disturb the minimum amount possible of wildlife or plant habitat. CZLUO § 23.07.176 implements ESHA Policies 29, 30, and 35 and generally repeats those policies requirements, and clarifies that the area to be disturbed by development must be shown on a site plan, and if grading is to occur it shall be defined on site by readily-identifiable barriers that will protect the surrounding native habitat areas.

CZLUO § 23.07.170 provides specific application content requirements for development proposed within or adjacent to an ESHA. § 23.07.170(a)(5) requires the biological report to determine whether the applicable setbacks from the habitat area required by §§ 23.07.170-23.07.178 are adequate to protect the habitat or recommends greater, more appropriate setbacks. This policy also states that a CDP cannot be approved without findings that there will be no significant impact on the identified sensitive habitat and the proposed use will be consistent with the biological continuance of the habitat, and that the proposed use will not significantly disrupt the habitat. Moreover, § 23.07.170(e) requires that all development within or adjacent to an ESHA shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. And if the development has the potential to cause significant adverse impacts to an ESHA, this development standard requires such development to be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.

Section 23.07.170 also provides that if development within ESHA cannot be avoided, then the allowed development shall be modified as necessary so that it is the “least environmentally damaging feasible alternative.” Section 23.07.170(e)(1)(i) implements the above ESHA policies’ development restriction that new development proposed within ESHA shall be limited to resource-dependent uses. Section 23.07.170(e)(1)(iv) states that where development results in an unavoidable loss of habitat area, replacement habitat, including habitat enhancement, must be provided and maintained by the project applicant. Such replacement habitat must generally be provided “at recognized ratios that successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost (‘same-kind’) and within the same biome (‘same-system’), and shall be permanently protected by a deed restriction

or conservation easement.” Next, § 23.170(e)(1)(v) mandates that development approval must be conditioned to require the restoration, monitoring, and long-term protection of such habitat areas through a restoration plan and an accompanying deed restriction or conservation easement. Where previously disturbed but restorable habitat for rare and sensitive plant and animal species exists on a site that is surrounded by other environmentally sensitive habitat areas, these areas shall be delineated and considered for restoration as recommended by a restoration plan.”

Finally, § 23.07.170(e)(2), which provides mandatory standards for development within ESHA to avoid a taking, is discussed below.

#### **5. ESHA Analysis for Proposed Sea Horse Lane Development (A-3-SLO-11-0055)**

The Commission’s substantial issue findings for **A-3-SLO-11-055** are hereby incorporated into the Commission’s *de novo* CDP determination.<sup>12</sup>

##### **a. The Entire 5-acre Sea Horse Lane Parcel is an ESHA Because It Consists of a Complex and Integrated Mosaic of Coastal Dune Scrub, Maritime Chaparral, and Pygmy Oak Woodland.**

The Commission finds that the entire 5-acre Sea Horse Lane Parcel is an ESHA. The entire parcel is covered by a pristine integrated system made up of three sensitive communities: coastal dune scrub, maritime chaparral and pygmy oak woodland.<sup>13</sup> The California Department of Fish and Game’s Natural Diversity Database identifies each of these communities as sensitive habitat.<sup>14</sup> The central coast dune scrub is a rare habitat type with a rarity ranking of G1 (critically imperiled, at very high risk of extinction due to extreme rarity), S2.2 (imperiled, at high risk of extinction due to very restricted range, very few populations, steep declines, or other factors), and an estimated 6-20 element occurrences (EOs) or 2,000-10,000 acres.<sup>15</sup> The rarity ranking of the maritime chaparral is G1, S1 (critically imperiled, at very high risk of extinction due to extreme rarity), with less than 6 Eos or 2000 acres estimated to be in existence.<sup>16</sup> Finally, the pygmy oak woodland on the Sea Horse Lane Parcel is limited to California’s central coast and consists of coast live oak (*Quercus agrifolia*) that does not exceed ten feet in height.<sup>17</sup> Development of the area has displaced nearby land formerly occupied by these three sensitive communities, resulting in the elimination of many stands over the years.<sup>18</sup> The Sea Horse Lane Parcel’s 5-acres remain almost entirely undisturbed, however, and the parcel is clearly an ESHA.<sup>19</sup>

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<sup>12</sup> See Exhibit 6.

<sup>13</sup> Appendix 2; See also **Exhibit 7**.

<sup>14</sup> Appendix 2 at pg. 9.

<sup>15</sup> See **Exhibit 7** at pg 2.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> See Appendix 3.

<sup>19</sup> Id.

These rare plant communities found on the Sea Horse Lane Parcel support a plethora of native plant species, including several rare plant species, such as the federally threatened Morro manzanita (*Arctostaphylos morroensis*).<sup>20</sup> According to a botanical survey conducted on the site, ‘Botanical Survey: Kellaway Property Lot 25 San Leandro and Adjacent 5 Acre Parcel (#42), Los Osos, California’ (“Kellaway Botanical Survey”), the following native plant species were observed on the Sea Horse Lane Parcel:

“*California croton (Croton californicus)*, *black sage (Salvia mellifera)*, *deerweed (Lotus scoparius)*, *mock heather (Ericameria ericoides)*, *coyote bush (Baccharis pilularis)*, *California sage (Artemisia californica)*, *sticky monkeyflower (Mimulus aurantiacus)*, *hollyleaf cherry (Prunus ilicifolia)*, and *buckbush (Ceanothus cuneatus)*. *Clumps of coast live oak (Quercus agrifolia)*, and *Morro manzanita* are scattered throughout the property.”<sup>21</sup>

The Kellaway Botanical Survey explains that the Morro manzanita, in addition to being listed federally as a threatened plant species, is also listed on the California Native Plant Society list (1B.1) of ‘seriously endangered plants in California.’ Historically, the Morro manzanita was estimated to be between 2,000 and 2,700 acres, but the current range is estimated to be between 840 and 890 acres, with the total number of individuals being as low 86,000. Approximately 65-percent of remaining habitat for Morro manzanita is in private ownership. On the Applicant’s 5-acre Sea Horse Lane Parcel, Morro manzanita is scattered throughout the site with sizes ranging from small to approximately 7 ft. tall. According to the Kellaway Botanical Survey, this proposed development poses several threats to the Morro manzanita, including direct removal needed for site construction and fire control. Moreover, this proposed development would fragment what is now five acres of undisturbed, native communities with Morro manzanita.

Other rare plant species listed by the California Native Plant Society that the Sea Horse Lane Parcel supports include the suffrutescent wallflower (*Erysimum insulare ssp. suffrutescens*) and the California spineflower (*Mucronea californica*), both ranked as 4.2 (moderately threatened in California). In addition, the site supports dune almond (*Prunus fasciculata* var. *punctata*), which is listed on the society’s watch list of not very threatened in California (ranking of 4.3).

Protected animal species are also found within these three sensitive habitat communities. Both the Sea Horse Lane Parcel and the San Leandro Court Parcel are subject to the Kellaway HCP, which specifically covers the federally endangered Morro shoulderband snail (*Helminthoglypta walkeriana*).<sup>22</sup> A Habitat Conservation Plan is a condition of acquiring a federal Incidental Take Permit, which permits the “take” of a species listed under the federal Endangered Species Act of 1973, 16 U.S.C. 1531 et. seq., as amended (“ESA”). Here, the Applicant applied for an Incidental Take Permit for the Morro shoulderband snail from the United States Fish and Wildlife Service (USFWS) for development of both parcels, and the corresponding Kellaway HCP contains measures that would minimize and mitigate development impacts on the Morro shoulderband snail and its habitat (the Applicant’s Incidental Take Permit and HCP cover only the Morro shoulderband snail and not the federally threatened Morro manzanita).

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<sup>20</sup> See Appendix 2 at pg 15.

<sup>21</sup> See Appendix 3.

<sup>22</sup> See Appendix 2

In sum, the entire 5-acres of the Sea Horse Lane Parcel is covered in a pristine and highly sensitive complex coastal ecosystem that provides habitat for two federally listed species, the Morro shoulderband snail and Morro manzanita, as well as numerous rare plant species. Therefore, the entire property falls within the LCP's definition of ESHA.

**b. The LCP Requires Denial of the Proposed Sea Horse Lane Development Because It is Inconsistent with the LCP ESHA Resource-Dependent Use Limitation Policy.**

As the Commission previously determined in finding that the County's approval of the Sea Horse Lane Development raised a substantial LCP conformance issue, the proposed Sea Horse Lane Development is categorically inconsistent with the LCP ESHA policy use limitation within ESHA. CZLUO § 23.07.170(e)(1), the mandatory development standard that implements LCP ESHA Policy 1, provides the limited circumstances in which a development project would be allowable within an ESHA: "New development within the habitat shall be limited to those uses that are dependent upon the resource." Although the Sea Horse Lane Development would include, under the terms of the Kellaway HCP, a 3.82-acre conservation easement, of which 0.24-acres of native coastal scrub would be restored, this required mitigation does not render this residential development project a habitat creation and/or enhancement use. The mitigation is merely incidental to the primary residential use, so the project is still inconsistent with the County's ESHA protection policies.<sup>23</sup> Moreover, because the Sea Horse Lane Parcel's entire 5-acres are an ESHA, alternative siting and design would not make a residential development proposal approvable on any portion of the parcel.

In sum, the LCP limits uses within ESHA to resource-dependent uses, and because the Sea Horse Lane Parcel is an ESHA, the LCP would require the Commission to deny all residential development proposed anywhere on the parcel's 5-acres. In cases in which the application of the LCP requires the Commission to deny a CDP for a proposed development, the Coastal Act requires the Commission to determine whether that denial could result in an unconstitutional taking of private property. If so, then the Coastal Act allows for the minimum amount of development to avoid a taking of private property without just compensation. Thus, the first step is to determine if denial would result in an unconstitutional taking; and if so, then what type and amount of development must the Commission allow to avoid a potential taking. The LCP provides specific mandatory development standards for development within an ESHA to avoid a taking. The takings analysis and the LCP taking avoidance measures are analyzed below.

**6. ESHA Analysis for Proposed San Leandro Court Development (A-3-SLO-14-0021)**

The Commission's substantial issue findings for **A-3-SLO-14-0021** are hereby incorporated into the Commission's *de novo* CDP determination.

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<sup>23</sup> See *McCallister v. California Coastal Commission*, (2008) 169 Cal.App.4<sup>th</sup> 912 (Court stated that a residential development that included habitat restoration was not a habitat restoration project: "The Project is not a habitat restoration project. Its purpose is to build a house for residential use, and such a use is not dependent on the seacliff buckwheat or bluff scrub...The fact that the Project includes enhancement, maintenance, and restoration does not convert its residential purpose into a resource-dependent use.").

**a. A Small Portion of the San Leandro Court Parcel Contains ESHA, and the Majority of the Parcel is Categorized as ESHA-Adjacent Because of the Parcel's Close Physical Proximity to the Pristine ESHA Found on the Contiguous Sea Horse Lane Parcel.**

The Commission finds that a portion of the San Leandro Court Parcel is ESHA and that the remainder of the parcel is ESHA-adjacent because of its close physical proximity to the three sensitive communities (coastal dune scrub, maritime chaparral and pygmy oak woodland) that cover the entire 5-acres of the contiguous Sea Horse Lane Parcel. The vegetation on the San Leandro Court Parcel stands in stark contrast to that of the Sea Horse Lane Parcel described above. The Kellaway Botanical Survey describes that “the boundaries between these two lots are sharply defined by the clearing on the San Leandro lot and the presence of [v]eldt grass.”<sup>24</sup> This is because the San Leandro Court Parcel was subject to significant grading to create step down parcels that eliminated ~~all~~ much of the natural resource values.<sup>25</sup> As a result, the San Leandro Court Parcel is currently dominated by veldt grass (*Ehrharta calycina*), which is non-native invasive species (originally from Africa), that once established tend to inhibit the recolonization of native species.<sup>26</sup> In addition, a small slope on the southern portion of the parcel is covered almost entirely by narrow-leaved ice plant (*Conicosia puginoiformis*). The parcel also supports a few small patches (approximately 25 sq. ft. each) of coastal scrub species.<sup>27</sup>

Although the San Leandro Court Parcel has been incorporated into the Kellaway HCP to protect the endangered Morro shoulderband snail and its habitat, the vast majority of the parcel does not rise to the level of ESHA. An initial survey of the San Leandro Court Parcel in 2002 concluded that the site was not significant habitat for the Morro shoulderband snail; however in a 2004-2005 protocol surveys, two live Morro shoulderband snails, and three of the snail's empty shells were found on the site. One live Morro shoulderband snail and one shell were within the site's ice plant. The other two shells and the other live Morro shoulderband snail were found within the site's patch of coastal scrub on the northeastern side of the lot. Nevertheless, United States Fish and Wildlife Senior Biologist Julie Vanderwier, who has worked on the Morro shoulderband snail in Los Osos for over ten years and participated in the development of the Kellaway HCP, stated that the San Leandro Court Parcel does not support significant native habitat and has no long term conservation value for the Morro shoulderband snail.<sup>28</sup>

Despite the presence of Morro shoulderband snails on the San Leandro Court Parcel during the 2004-2005 surveys, Commission Staff Biologist Engel concluded that “the majority of the biological resources it supports do not rise to the level of ESHA because the parcel is a disturbed and degraded area dominated by non-native and invasive veldt grass that is surrounded on three sides by development.” However, Ms. Engel did find that the coastal scrub habitat that is contiguous with the pristine habitat on the adjacent eastern Sea Horse Lane Parcel rises to the

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<sup>24</sup> Appendix 3 at pg. 3.

<sup>25</sup> See **Exhibit 7** at 3.

<sup>26</sup> Id.

<sup>27</sup> Id; See also Appendix 2 at pg. 15.

<sup>28</sup> See **Exhibit 7**.

level of ESHA. See **Exhibit 7** for the complete text of Commission Staff Biologist Engel's ESHA findings.

On these facts, the Commission concludes that the approximately one-half-acre San Leandro Court Parcel is ESHA-adjacent, and that a small portion of the degraded coastal scrub habitat on the parcel rises to the level of ESHA.

**b. The Proposed San Leandro Court Development Is Inconsistent with the LCP ESHA Policies Requiring that New Development that is ESHA-Adjacent Does Not Significantly Disrupt the Habitat and ESHA Requirements for Appropriate Setbacks.**

As detailed in the proceeding section, ESHA covers a northeast portion of the San Leandro Court Parcel, but the status of the parcel is primarily ESHA-adjacent due to the close proximity of the pristine ESHA on the eastern adjoining Sea Horse Lane Parcel. Under the LCP, new development proposed within an ESHA must be resource-dependent, and development proposed adjacent to an ESHA must be consistent with the biological continuance of the habitat. [ESHA Policy 29] Thus, in this case only resource-dependent uses would be allowed within the northeast corner of the San Leandro Court Parcel, and new development proposed adjacent to that corner or along the eastern property line of the parcel, must be a use that is consistent with the biological continuance of the habitat. Moreover, new development that is within an ESHA, or ESHA-adjacent, must not significantly disrupt or degrade the habitat. [ESHA Policies 1, 29] CZLUO 23.07.170 implements these LCP ESHA policy land use restrictions with a number of more specific requirements, including the requirement that a biological assessment of all proposed development sites within ESHA or adjacent to ESHA. That biological assessment must include, in part, verification that LCP applicable setbacks are adequate to protect the habitat or a recommendation of greater, more appropriate setbacks.<sup>29</sup> [CZLUO § 23.07.170(a)(5)] The County-LCP does not include an enumerated LCP setback for terrestrial habitat ESHA, rather it broadly mandates for protection of all endangered animal and plant terrestrial species, and requires ESHA-adjacent development to be sited and designed to that end. [CZLUO §§ 23.07.170(e), 23.07.176; ESHA Policy 29]

In this case, the Applicant did not provide a site-specific biological assessment stating that the HCP Morro shoulderband snail surveys and botanical surveys sufficed. Thus, the specific biological assessments criteria required by the LCP, such as verification of ESHA setbacks, were not evaluated. However, Commission Staff Biologist Engel recommends that then Commission require a 100-foot buffer between any development on the San Leandro Court Parcel and the pristine habitat located directly east on the Sea Horse Lane Parcel, as well as the ESHA located on the San Leandro Court Parcel.<sup>30</sup> A 100-foot buffer would be appropriate based on the exceptional sensitive habitat and rarity of many species found within it, including ensuring protection of the endangered Morro shoulderband snail, which has been found within 100-feet of ESHA on the San Leandro Court Parcel. A 100-foot buffer requirement would also satisfy the LCP's requirements that new development be sited in a manner that avoids disrupting or degrading the habitat, and it would ensure that the development would be consistent with the

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<sup>30</sup> See **Exhibit 7** at pg. 4.

biological continuance of the habitat. [ESHA Policy 1, 29] Attached as Exhibit 9 is a depiction of the potential developable area after imposition of the ESHA buffer and LCP-required front and side yard setbacks.

As proposed, the San Leandro Court Development is clearly inconsistent with the 100-foot buffer recommendation because the proposed development would impact the entire approximately one-half-acre parcel. See **Exhibit 2** the development site plan. And without a buffer between the proposed development and the ESHA, the development is not consistent with the LCP ESHA policies described above that the buffer contributed in implementing. Moreover, the proposed septic system, which is located within the on-site ESHA, is not a resource-dependent use and would significantly disturb that ESHA as well as the ESHA on the adjacent-parcel.

Finally, not only is the proposed development inconsistent with these applicable LCP ESHA policies, it is also inconsistent with the applicable setbacks required in the LCP Estero Plan's Planning Area Standard for development in the Residential Single-Family land use category in the Highland Area and Cabrillo Estates (front (25-feet), side (5-feet), corner side (10-feet) and rear (20 feet)) because it allows the residential structure within those setbacks in the parcel's southeast corner. In short, the proposed San Leandro Court Development is sited within the 100-foot setback that was determined to be the appropriate buffer necessary to implement the LCP's ESHA protection and preservation policies. For that reason, the LCP requires the Commission to deny the San Leandro Court Development. As explained above, denial under these circumstances requires the Commission to determine whether the application of the LCP policy would result in a takings of private property. The takings analysis and the LCP taking avoidance measures are analyzed below.

## ***7. Takings Analysis for ~~Sea Horse Lane Development~~***

### **a. The Coastal Act Allows for Development to Avoid an Unconstitutional Taking of Private Property Without Just Compensation.**

In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions to deny a CDP could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional taking, the Coastal Act provides a provision that allows a narrow exception to strict compliance with Act's regulations. Coastal Act § 30010 provides:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the assurance that its actions are consistent with § 30010. If the Commission determines that its action could constitute a taking, then the Commission could also find that application of § 30010 would overcome the presumption of denial. In this latter situation, the Commission will propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some reasonable amount of development.

In the remainder of this section, the Commission considers whether, for purposes of compliance with § 30010, its denial of all development on the Applicant's property could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of development on the San Leandro Court Parcel could constitute a taking, but given the lack of available water to serve the proposed development on the Sea Horse Lane Parcel and that the Sea Horse Lane Parcel and San Leandro Court parcel should together be interpreted as the relevant "parcel" for the purpose of a takings analysis, denial of the Sea Horse Lane Development ~~likely~~ would not constitute an unconstitutional taking at this time.

#### **b. General Principles of Takings Law**

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."<sup>31</sup> Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner."

The United States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than the direct appropriation of private property. [*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.] Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories. [*Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523]. The first category consists of those cases in which government authorizes a physical occupation of property. [*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.] The second category consists of those cases whereby government merely regulates the use of property. [*Yee*, 503 U.S. at 522-523]. Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation. [*Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18.] The Commission's actions are evaluated under the standards for a regulatory taking.

The Court has identified two circumstances in which a regulatory taking may occur. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved. [*Id.* at 1014]. The *Lucas* court emphasized, however, that this category is extremely narrow,

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<sup>31</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless.” [*Id.* at 1016-1017 (*emphasis* in original); *Riverside Bayview Homes*, 474 U.S. at 126 (regulatory takings occur only under “extreme circumstances.”).<sup>32</sup>]

The second circumstance in which a regulatory taking might occur is under the three-part, *ad hoc* test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations. [*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005.] In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur. [*See id.* (rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*).]

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property. [*MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348.] Premature adjudication of a takings claim is highly disfavored, and the Court’s precedent “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.” [*Id.* at 351.] Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review. [*Id.*] These general takings principles, as well as the threshold consideration regarding ripeness, are reviewed below for denial of both the San Leandro Court Development and the Sea Horse Lane Development.

### **c. The Relevant Parcel: Determination of Unit of Property for the Purpose of a Takings Analysis**

Takings analysis requires a determination of the measurement of property subject to taking. Generally this is not an issue because a property owner owns a single parcel, but if a property owner owns multiple adjacent parcels then it must be determined if a sufficient relationship between the parcels exist. The issue is complicated in cases; where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. That is the case here; the Applicant not only owns the 5-acre parcel but more than likely controls the contiguous one-half-acre San Leandro Court parcel through a trust, 7 Tracks Realty Trust.

In these circumstances, courts will analyze whether the lots are sufficiently related so that they can be aggregated as a single parcel for takings purposes. There is no rigid formula for

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<sup>32</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas*, supra, 505 U.S. at pp. 1028-1036).

determining the appropriate parcel in regulatory taking cases. [*Tahoe-Sierra*, 535 U.S. at 336.] Cases in the Federal Circuit and other jurisdictions lend guidance in determining what should constitute the relevant parcel in this case. Following guidance from relevant case law, the Commission has utilized a multi-factor balancing test to determine whether a sufficient relationship exists amongst the parcel; the following factors are commonly examined: (1) degree of contiguity, (2) dates of acquisition, (3) unity of ownership, and (4) the extent to which the property has been treated as a unit. [*District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880 (nine individual lots treated as single parcel for takings purposes).] Another factor that courts have considered in the relevant parcel calculus is the extent in which the preservation of the natural state enhances the value of the other parcel. [*Ciampitti v. United States*, (1991) 22 Cl. Ct. 310, 318.]

***i. Degree of Contiguity***

Courts consider whether parcels are physically adjacent when determining whether to aggregate parcels in a takings analysis. Geographical contiguity of parcels weighs in favor of aggregation. [*Id.* at 319.] Considering all contiguous property held by the same owners as one unit is an “intuitive starting point for determining the boundary of the property under a taking clause analysis.” [*Giovanella v. Conservation Commission of Ashland*, (Mass. 2006) N.E. 2d 451.] “Common sense suggests that a person owns neighboring parcel of land in order to treat them as one unit of property.” [*Id.*] Some courts even apply a strong rebuttable presumption that all contiguous land held by a single owner is to be treated as a unified parcel. [*Id.* (See also *District Intown Props. Ltd. Partnership*, 198 F.3d. at 880; *Forest Props., Inc v. United States*, (1999) 177 F.3d. 1360, 1365).] In this case, the degree of contiguity factor weighs in favor of aggregating the two parcels because they are physically contiguous.

***ii. Dates of Acquisition***

Courts also consider the dates of acquisition of the relevant parcels. Courts are generally more likely to favor aggregation of parcels the closer in time the parcels in question are acquired, but there is no bright line rule regarding acquisition timing. Same day acquisitions clearly weigh in favor of aggregation, but Courts have weighed in favor aggregation in cases where the parcels were acquired two to five months apart. [*Forest Props., Inc.*, 177 F.3d 1360; *See also Waleck v. U.S.*, (2001) 49 Fed. Cl. 248, 260.] At the other end of the spectrum, a court found that a landowner’s acquisition of two separate parcels nearly two decades apart weighed heavily in favor against aggregating the parcels. [*Cane Tennessee, Inc. v. United States*, (2004) Fed. Cir. 694.] In this case, the two parcels were acquired approximately a year-and-a-half apart: the Applicant purchased the one-half-acre San Leandro Court Parcel in January of 1998, and then purchased the 5-acre Sea Horse Lane Parcel in August of 1999. The timing of the acquisition supports parcel aggregation.

***iii. Unity of Ownership***

Common ownership or control of the parcels is an essential factor of the analysis. A single person owning all the parcels in fee simple clearly favors aggregation of the parcels. However, it becomes less clear in situations where parcels that were in common ownership are subsequently conveyed, or in situations in which a common person controls or has a sufficient interest in an entity that owns such a parcel. For purposes of this factor, ownership should not be based solely on the name on the property’s title but on what entity has possession or control of the property.

In this case, the names of the property's title are different for the two parcels. The Applicant (Thomas Kellaway) is the named owner of record with a fee simple interest of the Sea Horse Lane Parcel, and 7 Tracks Realty is the named owner of record of the San Leandro Court Parcel.

The California Court of Appeal has held that government entities may “look past the paper title in determining whether properties are under common ownership.” [*Kalway v. City of Berkeley*, (2007) 151 Cal.App.4th 827,833.] In *Kalway v. City of Berkeley*, the court ignored a landowner's last-minute deed to his wife because the landowner deeded the parcel in order to thwart operation of state law that would require merger of the parcels. Since the deed had no independent significance, the change in ownership was one of form rather than substance. The Idaho Supreme Court also addressed the issue of ownership form over substance, stating that “a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis.” [*City of Coeur d'Alene v. Simpson*, (2006) 142 Idaho 839, 849.] Thus, the court concluded, it could not “endorse a rule that turns a blind eye to all the relevant factual circumstances, including the purpose, character, and timing of any transfer, especially one made during the course of a takings case.” [*Id.*]

Similar to the property conveyances in those cases, the conveyance of property here appears, based on the available facts, to also be one of form rather than substance. From the time the Applicant acquired the one-half-acre parcel in 1998 until March of 2012 when the property was conveyed to the trust, the Applicant (Mr. Kellaway) was the named owner on the property title. On March 12, 2012, the Applicant transferred the property to 7 Tracks Realty Trust, which is shortly after the Commission determined that residential development on the parcel would only be approvable to avoid a takings. Thus, the timing of the transfer suggests that the transfer may have been simply to avoid the possibility of aggregation for the takings analysis. Also supporting that trust ownership of the San Leandro Court Parcel is one of form rather than substance is the fact that the Applicant remains the named contact for 7 Tracks Realty Trust, in conjunction with the fact that no fee was charged for the conveyance of the property (i.e., not a third-party transfer). Further support may be inferred from the fact that the CDP application for the proposed development on the property initially names the Applicant (Mr. Kellaway) as the landowner, only to be crossed-out and replaced with 7 Tracks Realty Trust, and that the Applicant has indicated that he planned to take water from the San Leandro Court Parcel to support the Sea Horse Lane Parcel. Thus, there may be substantial evidence in this case sufficient to show that the Applicant (Mr. Kellaway) effectively controls the adjacent San Leandro Court Parcel.

In determining the relevant parcel for takings analysis purposes, the task is to “identify the parcel as realistically and fairly as possible in light of the regulatory scheme and factual circumstances.” [*Ciampitti v. U.S.*, 22 Cl. Ct. at 318.] Applying that principle here and based on the available facts, the circumstances surrounding the Applicant's conveyance of the San Leandro Court Parcel may reasonably infer that the transfer of the property to the trust was one of form, not substance. In which case, application of the unity of ownership factor ~~would likely~~ weighs in favor of aggregation of the parcels.

***iv. The Extent to Which The Parcels Were Treated As One***

Another factor that courts generally weigh in determining what constitutes the relevant parcel for the purpose of takings analysis is the extent to which the parcel were treated as one. [*Forest Properties*, 177 F.3d; *see also Ciampitti v. U.S.*, 22 Cl. Ct. 310; *Norman v. United States*, (2004) Cl. Ct.] In the facts of this case, there are a number of instances in which the two adjacent parcels were treated as a one, including, but not limited to, the following: (1) the Applicant's initial CDP application submitted to the County stated that the property was 5.46-acres with a driveway traversing across the San Leandro Court Parcel to access the Sea Horse Lane Parcel; (2) the Kellaway HCP analyzes and treats both parcels as a single project and property; for example, it states, "The proposed project will create two single family homes on two adjoining undeveloped lots that total 5.53 acres, converting a total of 1.68 acres of undeveloped land for residential uses...[t]he entire 0.45 acre parcel will be developed for residential use..."; (3) the Kellaway HCP consolidates the mitigation (conservation easement) of both developments onto the Sea Horse Lane Parcel's 5-acres; (4) both proposed developments are designed by the same consultant; (5) the Applicant intended to access water for the Sea Horse Lane Development through the San Leandro Court Parcel; (6) site plans submitted in each application include both parcels; (7) the Kellaway Botanical Survey analyzes both parcels together; (8) the United States Fish and Wildlife Services analyzed both developments together for purposes of determining cultural resource impacts; (9) both proposed developments were subject to the same cultural resources study authored by the same consultant. Substantial evidence exists that the Applicant sought to develop these parcels as part of a unified development scheme and treated the parcels as a single property for those purposes. Therefore this factor also weighs in favor of aggregation of the parcels.

***v. Relevant Parcel Conclusion***

On balance, application of the available facts in this case ~~may support~~ an argument for treating both the San Leandro Court Parcel and the Sea Horse Lane Parcel as the single 'relevant parcel' for taking analysis purposes. However, at this time it is not necessary for the Commission to make such a determination because application of the water supply resource policies of the LCP requires denial of the Sea Horse Lane Parcel at this time, and this would not constitute a potential unconstitutional taking. Consequently, the relevant parcel for the takings analysis as it applies to the two CDP applications is the roughly 5.5-acre aggregation of the two parcels taken together as one whole ("Kellaway Property").

~~***d. Application of the LCP Water Supply Resource Policies Is Unlikely to Result in a Takings for the Sea Horse Lane Development, But Once Water Is Adequate, the Commission Should Consider Whether to Approve Residential Development to Avoid an Unconstitutional Taking.***~~

~~***i. The Commission's Denial of the Sea Horse Lane Development on Water Grounds Is Unlikely to Result in a Takings—***~~

~~As analyzed above, application of CZLUO § 23.04.430(a) requires denial of the proposed development on the grounds that Los Osos lacks sufficient water supply. Thus, it could be argued that the regulation results in an unconstitutional taking of the applicant's private property.~~

However, based on the law and facts analyzed below, it is unlikely that such a temporary denial of development would constitute an unconstitutional taking in this case.

At this time, application of the § 23.04.430(a) has the effect of a moratorium on new development requiring water that is located between the Los Osos USL and URL. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory takings. *Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302 (*Tahoe-Sierra*). In the *Tahoe-Sierra* case, the Court reasoned that, “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.* at 332. The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy. *Id.* at 337. “In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.” *Id.* at 337-38. Here, CZLUO § 23.04.430(a) has the effect of temporary prohibition on economic use, and as soon as the water supply is adequate the prohibition would be lifted. Moreover, § 23.04.430(a) is an essential component of a comprehensive LCP planning tool that ensures that growth in Los Osos is efficient and sustainable, not exceeding the community’s resource carrying capacity.

This position is also consistent with the California Court of Appeal for the Fourth District reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4<sup>th</sup> 1068 (*Pratt v. CCC*). In *Pratt v. CCC*, the plaintiff argued that Coastal Commission’s decision to deny a CDP because it was, like the proposed development in this case, inconsistent with § 23.04.430(a). The Court of Appeal upheld the Commission’s finding, and stated that the plaintiff applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; (2) that the setting or priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, “Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.” [*Id.*] The court also found that an “intent to serve letter” from a community water supplier did not change the result because there is no rule that the water company’s determination is definitive. [*Id.*] “It is undisputed,” the court continued, “that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft.” [*Id.*] The court further reasoned that because the plaintiff applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. In this case, that lack of water in Los Osos, not the regulation, is again has delayed the applicant’s ability to develop the site.

In sum, it is unlikely that the Commission’s decision to deny the proposed development, on the grounds that it is inconsistent with CZLUO § 23.04.430, would result in an unconstitutional taking. Although the regulation’s effect is a *de facto* moratorium on new development outside the USL at this time, this effect of the regulation is temporary in nature and caused by insufficient water supply resource in Los Osos.

***ii. If the Sea Horse Lane Development Becomes Consistent with the LCP’s Water Resource Policies, at Such Time, the Future Decision-Making Body May Need to Assess Whether***

***the Application of the LCP ESHA Policies Limiting the Type of Use Within an ESHA to Resource-Dependent Uses Would Result in a Taking***

In the event that the Sea Horse Lane Development becomes consistent with the LCP's water resource supply policies, the LCP would, nevertheless, require the denial of the development because, as explained above, the LCP prohibits residential uses within ESHA. As such, the Commission would in the future be required to determine for purposes of determining whether Coastal Act § 30010 is applicable here, whether such denial would result in an unconstitutional regulatory taking. The Commission would need to consider at that time the appropriate "denominator" for purposes of a takings analysis and whether approval of development on the San Leandro Court Parcel was sufficient to find that denial of development on the Sea Horse Lane Parcel did not deprive the applicant of private property without just compensation. If the Commission did find that it needed to approve development on the Sea Horse Lane Parcel to avoid an unconstitutional taking, it would need to approve the least amount of development necessary to avoid a taking, and it would need to site development on the least sensitive portion of the site. In this case, that would be the southeastern portion of the site, and likely a much smaller development footprint than the proposed 12,400 square foot home. It is premature at this time, however, for the Commission to consider whether or what type of residential development could be approved on the Sea Horse Lane Parcel, as there is inadequate water to serve this parcel at this time.

***e. Application of the LCP Appropriate ESHA Setback Requirement Would Result in a Takings of the San Leandro Court Parcel.***

As analyzed above, the LCP allows only resource dependent development in the portions of the San Leandro Court Parcel that constitute ESHA, and it prohibits development within the required 100 foot buffer to prevent impacts that would significantly degrade ESHA or would not be consistent with the biological continuance of the habitat. [ESHA Policy 29] As a result, application of the LCP's ESHA policies requires denial of the proposed residential development on the San Leandro Court Parcel. As shown in **Exhibit 9**, a 100 foot buffer, in conjunction with the general setback requirements for all single family residential development in this area of Los Osos, would leave only a very small portion of the parcel as developable. In contrast to the "takings" analysis of the Sea Horse Lane Parcel, it is therefore more likely that denial of residential development within the ESHA buffer on the San Leandro Court parcel at this time might constitute a taking of private property without just compensation.

*Categorical Taking*

The subject of what government action results in a "taking" was addressed by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council* (1992). In *Lucas*, the Court held that where a permit applicant has demonstrated that he or she has a sufficient real property interest in the property to allow the proposed project, and that project denial would deprive his or her property of all economically viable use, then denial of the project by a regulatory agency might result in a taking of the property for public use, unless the proposed project would constitute a nuisance under State law.

The Commission interprets § 30010, together with the *Lucas* decision, to mean that if an Applicant demonstrates that Commission denial of the project would deprive his or her property

of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act or LCP provision would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, unless the proposed project would constitute a public nuisance under state law, the applicable provisions of the Coastal Act or LCP cannot be read to deny all economically beneficial or productive use of land because these sections of the Coastal Act or LCP cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property owner of some economically viable use.

The San Leandro Court Parcel is located in a largely developed residential neighborhood and the lot is currently vacant. The San Leandro Court Parcel is zoned Single Family Residential under the LCP. Principal uses allowed within the zone include home occupations, mobile homes, secondary dwellings, temporary offices/dwellings; allowable uses include communication facilities, utility lines, child daycare, accessory storage, kennels, crop production and grazing; and conditionally permitted uses include public utility facilities, child daycare centers, personal services, public safety facilities, temporary construction yard (off site), grocery store, horse ranches, outdoor athletic facilities, golf driving ranges, swim clubs, religious facilities, schools.

The Commission finds that in this particular case, none of the other allowable principally permitted or conditionally permitted uses at the subject property would avoid development within ESHA or an ESHA buffer. All of the available land uses for the San Leandro Court Parcel would still require building a home or other structure within an ESHA or ESHA buffer, except for potentially the golf driving range, or crop production, both of which would not afford the property owners with an inherent economically viable use, and the first of which would not likely to be accommodated on a site of this size (given golf driving ranges are generally in excess of two to three hundred yards in length); moreover, even these uses could not be developed outside of ESHA or ESHA buffer. Furthermore, the property is located within an established residentially developed area where there is no impetus for public agencies to purchase the lot for recreational, open space, or habitat management uses. As shown on Exhibit 9, there is, however, a small corner of the property, approximately 200 square feet, that is not within the ESHA buffer or any required setbacks. There is the potential for development to be allowed in this location that might ensure that there is some economically beneficial use of this property, even after application of the relevant LCP policies. Thus, in this case, it is possible that a court might find that if the Commission were to allow development of a residential structure (if one could be accommodated in such a small area) within this footprint, it might not constitute a categorical taking under Lucas.

#### *Taking Under Penn Central*

While a court might not find a categorical “taking” under Lucas, it would still consider whether the permit decision would constitute a taking under the *ad hoc* inquiry stated in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-125. This *ad hoc* inquiry generally requires an examination into factors such as the sufficiency of the applicant’s property interest, the regulation’s economic impact, and the regulation’s interference with reasonable, investment-backed expectations.

#### Sufficiency of Interest

In the subject case, the Applicant purchased the San Leandro Court Parcel for \$220,000, and on 01/30/98 and took a fee simple interest in the property. On March 9, 2012 the Applicant conveyed the San Leandro Court Parcel to 7 Tracks Realty Trust through a Grant Deed that was recorded as Instrument Doc. # 2012013161 of the Official Records, San Luis Obispo County Recorder's Office, effectively transferring and vesting fee simple ownership to the Applicant.

Upon review of these documents, the Commission concludes that the Applicant has demonstrated that he has sufficient real property interest in the subject parcel to allow pursuit of the proposed project.

#### Reasonable Investment Backed Expectations

In this case, the Applicant's expectation that he could develop some type of structure on the property was both a reasonable and investment backed expectation. The Applicant purchased the property for \$220,000 in 1998. It was zoned for single family residential uses, not as open space, within developed residential neighborhood. Thus, the Applicant did have an investment backed expectation that he had purchased developable property, and his investment reflected that future development could be accommodated on the subject parcel.

To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

When the Applicant purchased the property, there was little obvious indication that development of a single family residence on the parcel would not be possible due to ESHA constraints. The site is largely degraded, having been significantly covered by invasive species (mostly veldt grass) that has been regularly mowed, and it is framed on two sides by residential development and on a third side by the San Leandro Court cul-de-sac itself. In addition, the nearby residential development consists of houses that are approximately 3,000 square feet in size. Applying the LCP's ESHA policies and required setbacks results in an allowable development footprint of approximately 200 square feet. The Applicant could potentially successfully argue that he had a reasonable investment backed expectation to construct residential development on the site that was larger than what could be accommodated on a 200 square foot development footprint.

#### Economic Impact

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on the Applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe Sierra Pres. Council, Inc., supra*, [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's

~~value by 91% not a taking}).~~

~~If the Commission were to deny all residential development on the property, consistent with the requirements of the LCP, then the Applicant could argue that the economic impact of the Commission's action was significant enough to constitute a taking. To address this potential takings claim and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act § 30010, this permit therefore allows for development on the San Leandro Court Parcel, although not precisely the development proposed by the Applicants.~~

**~~f. Nuisance Exception Analysis~~**

~~Finally, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation. *Lucas, supra*, 505 U.S. at 1028-1036. These background principles include a state's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project would not constitute a public nuisance, so as to preclude a finding that the Commission's denial of the project would constitute a taking. California Civil Code § 3479 defines a nuisance as follows:~~

~~*Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.*~~

~~California Civil Code § 3480 defines a public nuisance as follows:~~

~~*A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.*~~

~~The construction of a residence on the subject property would not create a nuisance under California law. The site is located in a residential area where the proposed single family residential development would be compatible with surrounding land uses.~~

**~~g. San Leandro Court Development Takings Analysis Conclusion~~**

~~To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act § 30010, the permit approval allows for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence that: (1) permanently restricting use of the property to resource dependent uses could potentially eliminate the economic value of the property; (2) residential use of a small portion of the property would provide an economic use; and (3) an applicant could have had a reasonable investment backed expectation that a mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the~~

~~final denial of a residential use, based on the LCP Policies and LCP Zoning Regulations would constitute a taking. Therefore, the Commission determines that in order to avoid an unconstitutional taking, the County LCP in this case does not preclude non resource-dependent development within sensitive habitats and buffers on the San Leandro Court property.~~

~~Having reached this conclusion, however, the Commission also finds that the LCP only instructs the Commission to construe the resource protection policies of the County LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on this appeal. Thus, the Commission must still comply with the requirements of the LCP by avoiding, to the maximum extent feasible, the significant disruption of habitat values at the site.~~

***8. ~~The Proposed San Leandro Court Development Is Inconsistent with the LCP's Mandatory Development Standards Applicable to New Development Allowed in ESHA to Avoid a Takings.~~***

~~Although the text of CZLUO § 23.07.170(e)(2) applies specifically to development in ESHA, the implementation of the applicable LCP ESHA policies in this case has had the effect of a taking for development proposed adjacent to ESHA and within the LCP's appropriate ESHA buffer. Thus, development proposed within an ESHA buffer must be consistent with the LCP development standards that allow for development in ESHA to avoid a takings.~~

~~Here, the San Leandro Court Development, as proposed by the Applicant, is inconsistent with mandatory development standards applicable to development allowed to avoid a takings. It is inconsistent with the first factor, the least amount of development necessary to avoid a takings, because the proposed 5,000 square foot two-story single-family residence is not the least amount to avoid a takings. The least amount to avoid a takings has been calculated using the *Penn Central* formula's "reasonable investment-backed expectation" factor. In turn, that factor depends on considerations such as the size of development on similarly situated lots and the distinct financial investment. Here, the average size of neighboring similarly situated residences is 3,304 square feet.<sup>33</sup> The \$220,000 purchase price for the San Leandro Court Parcel in 1998 is consistent with the value of the adjacent lots of the same size in which the average house is 3,304 square feet. Thus, an approximately 3,300 square foot residence would be consistent with a reasonable investment-backed expectation for developing the San Leandro Court Parcel. **Special Condition 1** limits the footprint of the development to the least sensitive portion of the site while still allowing construction of a single family two-story residential development of approximately 3,300 square feet, and conforms the development to § 23.07.170(e)(2)(i).~~

~~Next, because the proposed San Leandro Court Development would impact the entire 0.45-acre site, it is not consistent with the second and third standards, which require all development in and impacts to ESHA to be avoided to the maximum extent feasible, that any unavoidable impacts be~~

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<sup>33</sup> Average size residence of neighboring "similarly situated" parcels is 3,304 square-feet (281 San Leandro Ct.: 2,586 sq. ft. on 0.47-acre lot; 2569 San Dominico Ave.: 2,506 sq. ft. gross area on 0.46-acre lot; 2590 San Dominico Ave.: 3,451 sq. ft. gross area on 0.48-acre lot; 2560 San Dominico Ave.: 2,335 sq.ft. on 0.46-acre lot; 2580 Sam Dominico Ave.: 3,052 sq. ft. gross area on 0.46-acre lot). See **Exhibit X** for documentation.

limited to the maximum extent feasible, and all adverse impacts to be fully mitigated. Simply put, a total site impact does not avoid, nor limit, impacts to ESHA to any extent. This standard first requires avoidance of ESHA impacts to the maximum extent feasible, then to limit unavoidable impacts to that same degree. Siting the single family residence in the northwest corner of the San Leandro Court Parcel would place the development as far from the ESHA as feasible. To limit the unavoidable impacts to ESHA to the maximum extent feasible, the building footprint must be limited to that which is necessary to support the development of an approximately 3,300 square foot single family residence including an attached garage. The adoption of **Special Condition 1** will conform the San Leandro Court Development to § 23.07.170(e)(2)(ii)'s requirements because it: (1) avoids ESHA impacts by siting the development far from the ESHA as feasible; (2) limits impacts to ESHA by reducing the building footprint to 1,702 square feet for the residence and attached garage in aggregate; (3) sites the driveway and the septic system as far from the ESHA as feasible. Further, **Special Condition 7** ensures that all of the property outside of the development footprint will remain in open space.

To ensure ongoing conformity of the project with the certified LCP, **Special Condition 2** requires submittal of a Habitat Restoration Plan which ensures that the ESHA located on the site will be restored and protected. In addition, **Special Condition 1(b)** limits lighting, which can adversely impact sensitive habitats, and **Special Condition 1(c)** ensures that future site maintenance will be conducted pursuant to the terms and conditions of the CDP. Further, **Special Condition 3** requires the submission of a Landscape Plan that includes appropriate native, noninvasive and drought tolerant plants to be planted on the Applicants' property that will be compatible with the surrounding habitats. In addition, to protect sensitive habitats as well as water quality, as required by the LCP, **Special Condition 5** requires submission of a storm water pollution prevention plan to minimize any adverse impacts to these sensitive habitats, and local watercourses. Finally, during construction, measures are necessary to minimize impacts to ESHA and protect overall water quality, consistent with the LCP. Therefore, **Special Condition 4** requires submission of a construction plan with best management practices, including requirements for a biological monitor to ensure appropriate protection for any Morro shoulderband snails that may be found on the property.

The Commission finds that the special conditions attached to the permit will protect sensitive habitats to the extent feasible, and will thus minimize significant adverse impacts to sensitive habitats while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

#### **d. Analysis**

As stated previously, a regulatory taking of private property can be found either under the *per se*, categorical rules set forth by the Court in *Lucas*, or by applying the *ad hoc* factors outlined in *Penn Central*. Under either test, a threshold issue consideration is the sufficiency of the Applicant's real property interest. In this case, as explained in the remainder of this section, the denial of the proposed San Leandro Court Development could result in a regulatory taking of the Applicant's property.

#### **i. Sufficiency of Interest**

In this case, and as explained above, the relevant parcel for purposes of the taking analysis is both the San Leandro Court Parcel and the Sea Horse Lane Parcel as a whole (again, the Kellaway Property). The Applicant purchased the San Leandro Court Parcel for \$220,000 on January 30, 1998 and took a fee-simple interest in the property. On March 9, 2012 the Applicant conveyed the San Leandro Court Parcel to 7 Tracks Realty Trust. At that time, a Grant Deed was recorded as Instrument Number 2012013161 of the San Luis Obispo County Recorder's Office Official Records, effectively transferring and vesting fee-simple ownership to the Applicant. The Applicant purchased the Sea Horse Lane Parcel for \$269,000, and on January 29, 1998 took a fee-simple interest in the property.

Upon review of these documents, the Commission concludes that the Applicant has demonstrated that he has sufficient real property interest in the Kellaway Property to pursue the proposed project.

## **ii. Categorical Taking Analysis**

As the Supreme Court held in *Lucas*, the test for a *per se*, categorical regulatory taking is whether the regulatory action deprives the landowner of all economically viable use. The rationale behind such a finding is that where there exists a total deprivation of beneficial use, it is essentially the equivalent of a physical taking. *Lucas*, 505 U.S. at 1107.

In this case, the Commission's action to deny the San Leandro Court Development might result in a categorical taking under *Lucas*. The LCP ESHA policies prohibit non-resource dependent uses within ESHA and require an appropriate development setback from ESHA. These policies, taken together with the Estero Planning Area's general setback requirements for single-family residential development leave only approximately 200 square feet of the Applicant's approximately 5.5-acre property available for the purpose of residential development. The LCP-required minimum size for a single-family residential development in this neighborhood is 1,200 square feet. So the applicant would be unable to build a 1,200 square foot home with a building envelope of 200 square feet and a height limit of fifteen feet.

Thus, the effect of the LCP on the Applicant's property would be to require 5.46 acres to be left in an all-natural state, leaving the Applicant with no residential use of the property. The Commission is unaware of a viable alternative use of this property at this time. Thus, it is possible that the Commission's denial would result in a *per se*, categorical regulatory taking. Even if the Commission's action did not result in a taking under the analysis in *Lucas*, it is likely to be found to be a taking under the fact-specific factors set forth in *Penn Central*.

## **iii. Penn Central Taking Analysis**

In *Penn Central*, the Supreme Court identified three primary factors to be weighed in determining whether a regulatory imposition could constitute a taking under the Fifth Amendment, thereby requiring the government to pay just compensation for the taking of private property. [*Penn Central*, 438 U.S. 104.] The *Penn Central* inquiry factors are: (1) the character of the government action; (2) the applicant's reasonable-investment backed interest; (3) the economic impact the government regulation has on the applicant.

**1. Reasonable-Investment Backed Interest**

In this case, the Applicant's expectation that he could develop some type of structure on the Kellaway Property was both a reasonable and investment-backed expectation. The Applicant purchased the San Leandro Court Parcel portion of the property for \$220,000 in 1998. It was zoned for single-family residential uses, not as open space, within a developed residential neighborhood. The Applicant purchased the Sea Horse Lane Parcel portion of the property for \$259,000 in 1999. It was zoned for single-family residential uses, not as open space, with a combination of open space and residential uses on neighboring parcels.

Thus, the Applicant did have an investment-backed expectation that he had purchased property that could be developed for residential uses, and his investment reflected that future development could be accommodated on the Kellaway Property.

To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

When the Applicant purchased the Kellaway Property, there was an indication that development of a single-family residence on the whole parcel would not be possible due to ESHA constraints. A portion of the site, however, (i.e., nearest San Leandro Court) is largely degraded, and it is adjacent to residential development. Given these factors, it was reasonable for the Applicant to expect that at least a portion of the property could be developed for residential use.

**2. Economic Impact**

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on the Applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., supra*, [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]).

If the Commission were to deny all residential development on the property, consistent with the requirements of the LCP, then the Applicant could argue that the economic impact of the Commission's action was to remove all economic value from his property – a significant enough diminution in value to constitute a taking.

**3. Character of the Government Action**

The final *Penn Central* factor requires consideration of the "character" of the Commission's action. The court in *Penn Central* elaborated on this factor by stating that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. In

applying this test, courts have accepted that government agencies have a legitimate public welfare interest in protecting the environment, such as wetlands, endangered species and air quality. *Loveladies Harbor* (1994) 28 F. 3d 1171, 1175 (holding that "the importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas . . . through appropriate regulatory mechanisms is not here being questioned."); *Florida Rock Indus., Inc. v. United States* (1986) 791 F. 2d 893, 904 (finding that "the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time");

This factor tends to consider "fairness," and in this context the Supreme Court has considered relevant to this factor: (i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual. *Eastern Enterprises, Inc., v. Apfel* (1998) 524 U.S. 498, 537.

Here, the Coastal Commission has a legitimate public welfare obligation to protect native habitat and endangered species through a public program that protects ESHA. The property was subject to the County's LCP when the Applicant purchased it, and the ESHA protection policies are applied equally to all properties subject to the County's LCP. This factor therefore weighs against finding a taking in this case.

#### **iv. Takings Analysis Conclusion**

In view of the evidence that: (1) permanently restricting use of the property to protect ESHA would prohibit all residential development on the property; (2) prohibiting residential use on the property could potentially significantly diminish the economic value of the property; and (3) that an applicant could have had a reasonable investment-backed expectation that a mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the LCP policies, would constitute a taking. Therefore, the Commission determines that in order to avoid an unconstitutional taking, the County LCP in this case does not preclude development within sensitive habitat buffers on the Applicant's approximately 5.5-acre property.

Having reached this conclusion, however, the Commission also finds that the LCP only instructs the Commission to construe the resource protection policies of the County LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on these applications. Thus, the Commission must still comply with the requirements of the LCP by avoiding, to the maximum extent feasible, the significant disruption of habitat values at the site.

#### **8. LCP Taking Avoidance Policy Analysis**

As the preceding sections explained, the Commission can approve a single-family residential development within an ESHA, or within an ESHA buffer, to avoid an unconstitutional taking of the Applicant's private property, but any such development would only be approvable if it is consistent with CZLUO § 23.07.170(e)(2), the LCP policy that allows for development in ESHA to avoid a taking. The text of CZLUO § 23.07.170(e)(2) specifically refers to development *in* ESHA, but implementation of the applicable LCP ESHA policies in this case has had the effect

of a taking for development proposed adjacent to ESHA and within the LCP's appropriate ESHA buffer, in addition to development within ESHA. Thus, development proposed within an ESHA buffer must be consistent with the LCP development standards that allow for development in ESHA to avoid a taking of private property without just compensation.

CZLUO § 23.07.170(e)(2) provides three mandatory development standards that apply to new development allowed in ESHA to avoid a takings: (a) the amount and type of development allowed shall be the least necessary to avoid a taking; (b) all development in and impacts to ESHA shall be avoided to the maximum extent feasible; any unavoidable impacts shall be limited to the maximum extent feasible; and (c) all adverse impacts to the ESHA shall be fully mitigated. In this case, as explained in the analysis of these development standards below, the proposed development of two residences (a 5,000 square-foot single-family residence and a 12,400 square-foot residence), as well as driveways, septic systems, and other related residential development on the Kellaway Property, is not consistent with subsection (a) or (b) of CZLUO § 23.07.170(e)(2).

**a. The Proposed Development Is Not The Least Amount of Development Necessary to Avoid a Takings.**

The first development standard requires that development within ESHA must be the amount and type that is the least necessary to avoid an unconstitutional taking. Here, the type of development the Applicant proposes is two single-family residences, which are allowed uses under the applicable zoning designation. However, although the use type is appropriate, non-resource dependent development is not permissible in ESHA, and the proposed 5,000 and 12,400 square-foot residences and related development are not the least amount of such development necessary to avoid a taking, so the proposed development is not consistent with CZLUO § 23.07.170(e)(2)(i).

The least amount of residential development needed to avoid a taking under these circumstances requires identifying the point in which the government regulation “goes too far” under the *Penn Central* test. The three factors of the *Penn Central* ad hoc analysis are: (1) the character of the government action; (2) the applicant's reasonable-investment backed interest; and (3) the economic impact the government regulation has on the applicant's property. First, as explained above, the character of the government action in this case weighs against finding a taking because the regulation merely affects the Applicant's property interest through a public program that adjusts the benefits and burdens of economic life to promote a common good—the protection of coastal resources.

The second *Penn Central* factor, the Applicant's reasonable investment-backed expectations, depends on whether the landowner has a reasonable expectation to use property in the same manner as similarly situated landowners. Here, the average size of a single-family residence on neighboring similarly situated parcels is approximately 3,300 square-feet.<sup>34</sup> The Applicant's distinct investment for the total 5.5-acre Kellaway property was \$479,000 (\$220,000 for the half-

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<sup>34</sup> Average size residence of neighboring parcels is 3,304 square-feet (281 San Leandro Ct.: 2,586 sq. ft. on 0.47-acre lot; 2569 San Dominico Ave.: 2,506 sq. ft. gross area on 0.46-acre lot; 2590 San Dominico Ave.: 3,451 sq. ft. gross area on 0.48-acre lot; 2560 San Dominico Ave.: 2,335 sq.ft. on 0.46-acre lot; 2580 San Dominico Ave.: 3,052 sq. ft. gross area on 0.46-acre lot; 303 Madera St.: 2,880 sq. ft. gross area on a 5 acre lot; Sea Horse Lane: 3,331 sq. ft. gross area on 5 acre parcel).

acre parcel in 1998, and \$259,000 for the 5-acre parcel in 1999). The \$479,000 purchase price for the Kellaway property is proportionately consistent with the value of the adjacent lots. Thus, a reasonable investment-backed interest on these facts would be to develop an approximately 3,300 square-foot single-family residence on the parcel, not the proposed 5,000 square-foot residence and the proposed 12,400 square foot residence together, nor either of them individually.

The third factor in the *Penn Central* analysis is the economic impact the regulation has on the value of the property. Courts generally evaluate the economic impact of the regulatory imposition on a property by evaluating the change in fair market value as a result of the regulation. *Waleck v. United States*, (2001) 49 Fed. Cl. 248, 258. In other words, compare the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, (1987) U.S. 470, 497. Here, the Applicant's 5.5-acre property has an approximate value of \$621,000.<sup>35</sup> Based on an analysis of similarly situated parcels, it is likely that the value of the Applicant's property would actually increase with a CDP to construct a 3,300 square-foot residence. For example, the 3,331 square-foot single-family residence on the 5-acre parcel located directly south of the Applicant's property was assessed in 2013 at a total value of \$1,461,236, of which the land is valued at \$733,763.<sup>36</sup> Similarly, the 2,880 single-family residence on the 5-acre parcel located directly north of the Applicant's property was assessed in 2013 at a total value of \$1,275,000, of which the land value comprises \$612,000.<sup>37</sup> Thus, an approximately 3,300 square-foot residence will likely increase the total value of the Applicant's property. Thus, there would be no diminution in the value taken from the property. In other words, the Applicant's total investment of \$479,000 would be recouped with a CDP for a 3,300 square-foot single-family residence. Consequently, the economic impact factors weighs heavily against finding an unconstitutional taking based upon the Commission's approval of a 3,300 square-foot residence, rather than the proposed 5,000 square-foot and 12,400 square-foot residences.

On balance, an approximately 3,300 square-foot single-family residence development would avoid a taking of private property without just compensation in a manner that is consistent with the "least amount" of development required to avoid a taking. **Special Condition 1** limits the footprint of the development to 1,650 square-feet and allows construction of a single-family two-story residential development of approximately 3,300 square-feet, and conforms the development to § 23.07.170(e)(2)(i).

**b. Development Must Avoid Impacts in and to ESHA to the Maximum Extent Feasible, and Limit Unavoidable Impacts in and to ESHA to the Maximum Extent Feasible.**

As proposed, the development would impact approximately 1.25 acres (0.5 acres on the San Leandro Court parcel and 0.75 acres on the Sea Horse Lane parcel) of the Applicant's 5.5-acre property, so it is not consistent with the second and third standards found in CZLUO §

<sup>35</sup> As of 2013, the Sea Horse Lane Parcel's land value was \$335,743, and the San Leandro Court Parcel's land value was \$285,257. RealQuest.com Property Detail Reports, last accessed 3/14/2014.

<sup>36</sup> RealQuest.com Property Detail Report for 2627 Sea Horse Lane, Los Osos, CA, 93402-4216, last accessed on 3/14/2014.

<sup>37</sup> RealQuest.com Property Detail Report for 303 Madera St., Los Osos, CA, 93402-4215, last accessed on 3/14/2014.

23.07.170(e)(2). These standards require all development in and impacts to ESHA to be avoided to the maximum extent feasible, that any unavoidable impacts be limited to the maximum extent feasible, and that all adverse impacts to ESHA be fully mitigated. Simply put, large residences located in ESHA and ESHA buffer areas do not avoid, or limit, impacts to ESHA to any extent. This standard first requires avoidance of ESHA impacts to the maximum extent feasible, then to limit unavoidable impacts to that same degree. Siting a single-family residence in the northwest corner of the San Leandro Court Parcel would place the development as far from the ESHA as feasible.

To limit the unavoidable impacts to ESHA to the maximum extent feasible, the building footprint must be limited to that which is necessary to support the development of an approximately 3,300 square-foot single-family residence including an attached garage. The adoption of **Special Condition 1** will conform the approved development to § 23.07.170(e)(2)(ii)'s requirements because it: (1) avoids ESHA impacts by siting the development as far from the ESHA as feasible; (2) limits impacts to ESHA by reducing the building footprint to 1,650 square-feet for the residence and attached garage in aggregate; (3) sites the driveway and the septic system as far from the ESHA as feasible. Further, **Special Condition 10** prohibits all development other than restoration and other resource-dependent uses on the Sea Horse Lane Parcel, consistent with the LCP's requirement to avoid development in ESHA. It also requires that a deed restriction be recorded against both the San Leandro Court and Sea Horse Land Parcels that ties the lots together for development purposes, ensuring that the properties will be treated as a single unit for purposes of future development proposals, thereby avoiding future attempts to develop in the ESHA on the Sea Horse Lane Parcel. Finally, **Special Condition 7** ensures that all of the property outside of the development footprint will remain in open space.

**c. Must Fully Mitigate All Adverse ESHA Impacts**

Furthermore, to ensure ongoing conformity of the project with the certified LCP, **Special Condition 2** requires submittal of a Habitat Restoration Plan which ensures that the ESHA located on the site will be restored and protected. In addition, **Special Condition 1(b)** limits lighting, which can adversely impact sensitive habitats, and **Special Condition 1(c)** ensures that future site maintenance will be conducted pursuant to the terms and conditions of the CDP. Further, **Special Condition 3** requires the submission of a Landscape Plan that includes appropriate native, noninvasive and drought-tolerant plants to be planted on the Applicant's property that will be compatible with the surrounding habitats. In addition, to protect sensitive habitats as well as water quality, as required by the LCP, **Special Condition 5** requires submission of a storm water pollution prevention plan to minimize any adverse impacts to these sensitive habitats, and local watercourses. Finally, during construction, measures are necessary to minimize impacts to ESHA and protect overall water quality, consistent with the LCP. Therefore, **Special Condition 4** requires submission of a construction plan with best management practices, including requirements for a biological monitor to ensure appropriate protection for any Morro shoulderband snails that may be found on the property.

The Commission finds that the special conditions attached to the permit will protect sensitive habitats to the extent feasible, and will thus minimize significant adverse impacts to sensitive

habitats while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

### **9. Additional Taking Analysis for the Proposed Sea Horse Lane Development**

As analyzed above, the Sea Horse Lane Development and the San Leandro Court Development must be analyzed together as the “denominator” for determining whether the Commission’s action could constitute an unconstitutional taking. The above analysis shows that the approval of a 3,300 square foot residence would avoid an unconstitutional taking in this case.

Even if the properties were not properly aggregated for assessing the takings question, however, the Commission’s denial of the Sea Horse Lane Development would not constitute an unconstitutional taking because there is inadequate water for the proposed development. Application of CZLUO § 23.04.430(a) requires denial of the proposed Sea Horse Lane Development on the grounds that Los Osos lacks sufficient water supply.

At this time, application of the § 23.04.430(a) has the effect of a moratorium on new development requiring water that is located between the Los Osos USL and URL. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory taking. *Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302 (*Tahoe-Sierra*). In the *Tahoe-Sierra* case, the Court reasoned that, “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.* at 332. The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy. *Id.* at 337. “In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.” *Id.* at 337-38. Here, CZLUO § 23.04.430(a) has the effect of a temporary prohibition on economic use, and as soon as the water supply is adequate the prohibition would be lifted. Moreover, § 23.04.430(a) is an essential component of a comprehensive LCP planning tool that ensures that growth in Los Osos is efficient and sustainable, not exceeding the community’s resource carrying capacity.

This position is also consistent with the California Court of Appeal for the Fourth District’s reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4<sup>th</sup> 1068 (*Pratt v. CCC*). In *Pratt*, the plaintiff argued that the Coastal Commission’s decision to deny a CDP because it was, like the proposed Sea Horse Lane Development in this case, inconsistent with § 23.04.430(a). The Court of Appeal upheld the Commission’s finding, and stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; (2) that the setting or priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, “Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.” [*Id.*] The court also found that an “intent-to-serve letter” from a community water supplier did not change the result because there is no rule that the water company’s determination is definitive. [*Id.*] “It is undisputed,” the court continued, “that there is substantial evidence from which the Commission could conclude the

groundwater basin from which the water would come is in overdraft.”[ *Id.*] The court further reasoned that because the plaintiff-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. In this case, that lack of water in Los Osos, not the regulation, is another reason why this property is currently undevelopable.

In sum, the Commission’s decision to deny the proposed Sea Horse Lane Development on the grounds that it is inconsistent with CZLUO § 23.04.430 is unlikely to result in an unconstitutional taking because the Applicant is permitted to build a single-family residence on the portion of the property within the USL. Furthermore, although the regulation’s effect is a *de facto* moratorium on new development outside the USL at this time, this effect of the regulation is temporary in nature and caused by insufficient water supply resource in Los Osos.

#### ***10. Analysis of Proposed Development’s Consistency with the Coastal Act’s Public Access and Recreation Policies***

For development proposed between the first public road and the sea, the standard of review is the Coastal Act’s public access and recreation policies. Both the Sea Horse Lane Parcel and the San Leandro Court Parcel are located between the first public road (Los Osos Valley Road) and the sea.

The Coastal Act provides that in carrying out the requirement of the California Constitution, Article X § 4, “maximum access shall be conspicuously posted and recreational opportunities shall be provided for all people consistent with public needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.” [Pub. Res. Code § 30210] For new development projects, the Act states that “public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects,” and provides three exceptions to that rule, including where “adequate access exists nearby.” [Pub. Res. Code § 30212] The Act further requires that development shall not interfere with the public’s right of access to the sea where acquired through use or legislation. [Pub. Res. Code § 30211] Section 30223 of the Act also requires that, “Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.” [Pub. Res. Code. § 30223] In the separate Initial Studies conducted for each proposed development, it was determined that the developments were “not proposed in a location that will affect any trail, park, recreational resource, coastal access, and/or Natural Area.” In the findings for San Leandro Court Development, the County determined that the proposed use was in conformity with the Coastal Act’s public access and recreation policies reasoning that the proposed development sites were within the Los Osos URL and that an existing coastal access point exists within ¼-mile of the San Leandro Court Parcel. For the Sea Horse Lane Development, the County similarly found the development consistent with those policies because it was located within the URL and that existing coastal access point exists within ¾-mile of the Sea Horse Lane Parcel. Thus, neither the San Leandro Court Development nor the Sea Horse Lane Development raise coastal access and recreation issues, and the proposed developments are consistent with the Coastal Act policies.

### ***11. Other***

To ensure that future property owners are properly informed regarding the terms and conditions of this approval, this approval is also conditioned for a deed restriction to be recorded against the property (see **Special Condition 6: Deed Restriction**). This deed restriction will record the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

### ***12. CDP Determination Conclusion for A-3-SLO-11-055 (Sea Horse Lane Development)***

The Commission denies the proposed Sea Horse Lane Development consisting of an approximately 12,400 square-foot single-family residence on the 5-acre Sea Horse Lane Parcel in the community of Los Osos in San Luis Obispo County, because this proposed development is inconsistent with the ESHA protection policies of the LCP as well as LCP CZLUO § 23.04.430(a), and Public Works Policy 1.

These LCP policies require the Commission to deny this proposed development because the entire property is ESHA, and only resource-dependent development is allowed in ESHA, and because the Los Osos water supply is not sufficiently adequate to support the existing development as well as future development on the 577 presently vacant undeveloped parcels within the USL. When the Los Osos water supply is no longer designated as alert level III (or level II), or at a time in which it can be otherwise be shown that adequate water supply exists to support existing demand as well as future development on all presently vacant parcels within the USL, then a development that requires water may be allowed on the 5-acre Sea Horse Lane Parcel.

~~However, even when the Los Osos water supply is adequate, the Sea Horse Lane Development, as proposed, would still not be consistent with CZLUO § 23.07.170(e)(2) because the development's scale is not the least amount of development necessary to avoid a taking, and its design and siting location does not avoid impacts to ESHA to maximum extent feasible. Future proposals to develop this site should therefore propose development in the least sensitive portion of the site (the southeast corner abutting Sea Horse Lane) and propose a smaller development (approximately 3,000 sq. ft. for the residence and garage in aggregate) more in keeping with the size of surrounding residential development.~~

~~In sum, the Commission hereby denies the proposed Sea Horse Lane Development because it is inconsistent with CZLUO § 23.04.430(a) and Public Works Policy 1 of the LCP.~~

### ***13. CDP Determination Conclusion for A-3-SLO-14-0021 (San Leandro Court Development)***

The Commission approves with conditions the proposed San Leandro Court Development of a single-family residence on the one-half-acre parcel accessed from San Leandro Court in the Cabrillo Estates neighborhood in the community of Los Osos in San Luis Obispo County. The recommended conditions ensure consistency with the LCP mandatory development standards applicable to new development allowed within an ESHA to avoid a takings (CZLUO § 23.07.170(e)(2)).

## **H. California Environmental Quality Act (CEQA)**

### **A-3-SLO-14-0021 (7 Tracks Realty Trust):**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The County, acting as the lead CEQA agency, conducted an Initial Study on the proposed project and found that there was no substantial evidence that the project would have a significant effect on the environment. As such, it issued a Mitigated Negative Declaration pursuant to Public Resources Code Section 21000 et seq., and California Code of Regulations Section 15000 et seq., and proposed mitigation measures as conditions of approval.

The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. The Commission has reviewed the relevant coastal resource issues with the proposed project, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference.

The Commission finds that only as conditioned by this permit will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

### **A-3-SLO-11-55 (Kellaway):**

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

***CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects. [Relevant Portion.]** A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*

***Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication.** ... (b) This division does not apply to any of the following activities: ... (5) Projects which a public agency rejects or disapproves.*

***CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved. (a) CEQA***

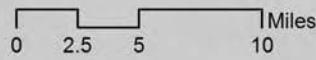
*does not apply to projects which a public agency rejects or disapproves.*

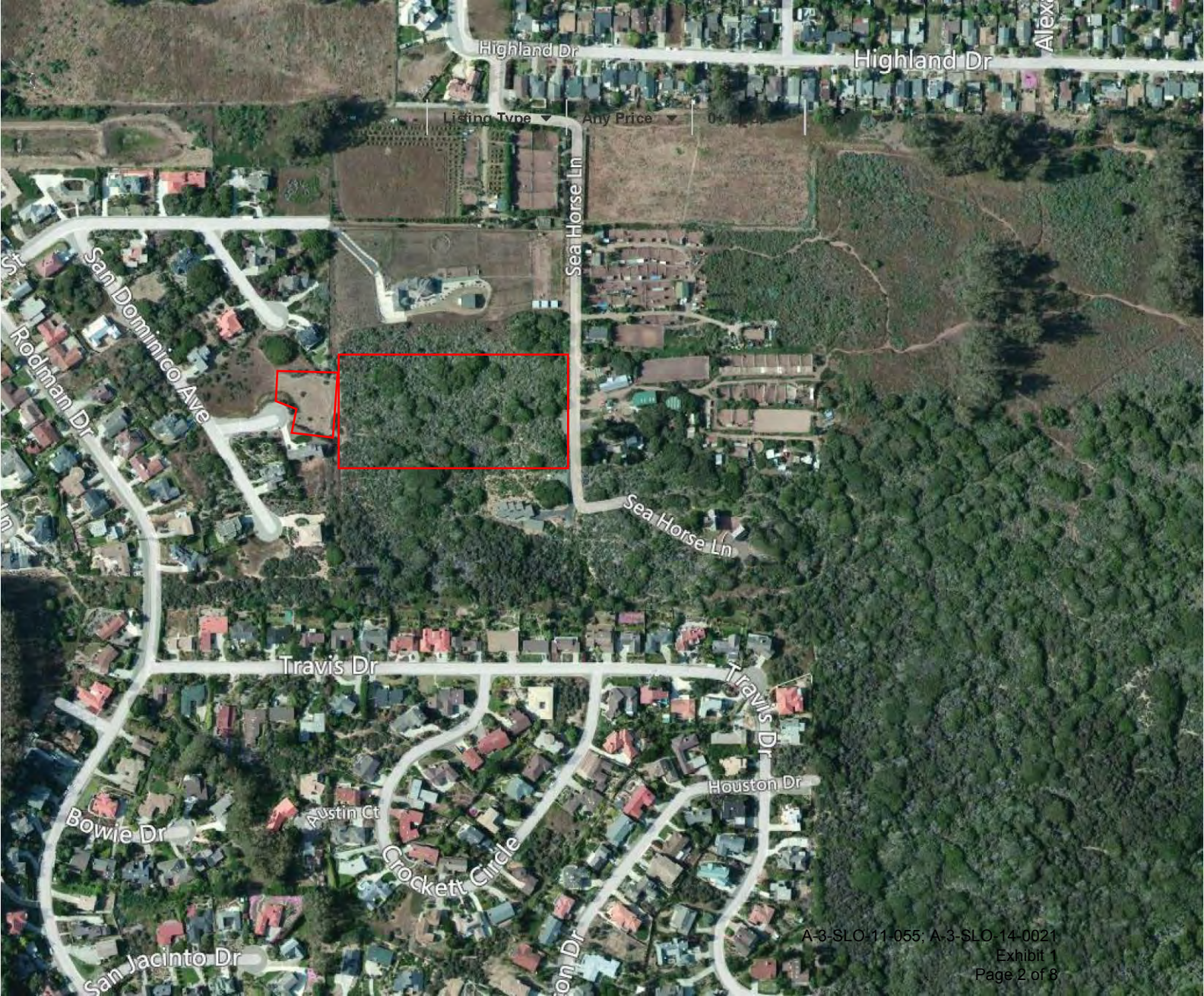
Section 13096 (14 CCR) requires that a specific finding be made in conjunction with coastal development permit applications about the consistency of the application with any applicable requirements of CEQA. This report has discussed the relevant coastal resource issues with the proposed project. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed project would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to CEQA Guidelines (14 CCR) Section 15042 “a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.” Section 21080(b)(5) of the CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project was approved as proposed. Accordingly, the Commission’s denial of the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

1. *Draft Basin Plan for the Los Osos Groundwater Basin*, July 31, 2013.
2. *Low-Effect Habitat Conservation Plan for Federally endangered Morro shoulderband snail on the Kellaway Property, Los Osos, California*, SWCA Environmental Consultants, June 24, 2010.
3. *Botanical Survey: Kellaway Property Lot 25 San Leandro ad Adjacent 5 Acre Parcel (#42), Los Osos, California*, V.L. Holland, May 2000 (revised November 7, 2000).
4. *Notice of Preparation—Draft Environmental Impact Report/NEPA Document & Scoping Meeting Notice for the Los Osos Community-Wide Habitat Conservation Plan and Implementing Agreement and Notice of Scoping Meeting ED12-061*, San Luis Obispo County Department of Planning and Building, September 20, 2013.





Highland Dr

Highland Dr

Alex

Listing Type

Any Price

04/2021

Sea Horse Ln

San Dominico Ave

Rodman Dr

Sea Horse Ln

Travis Dr

Trevis Dr

Houston Dr

Austin Ct

Bowie Dr

Crockett Circle

San Jacinto Dr

on Dr



Parcels	Land Use and Mitigation	Vegetation
<div></div> 5.08 Acre Lot <div></div> 0.45 Acre Lot	<div></div> Total Development Area = 1.68 Acres <div></div> Open Space Easement = 3.82 Acres	<div></div> Habitat Restoration Area = 0.24 Acres <div></div> Morro Manzanita <div></div> Oak Tree
Total Parcel Size = 5.53 Acres	Proposed Mitigation Ratio 3.3:1	Removals: 11 Manzanita 2 Oaks



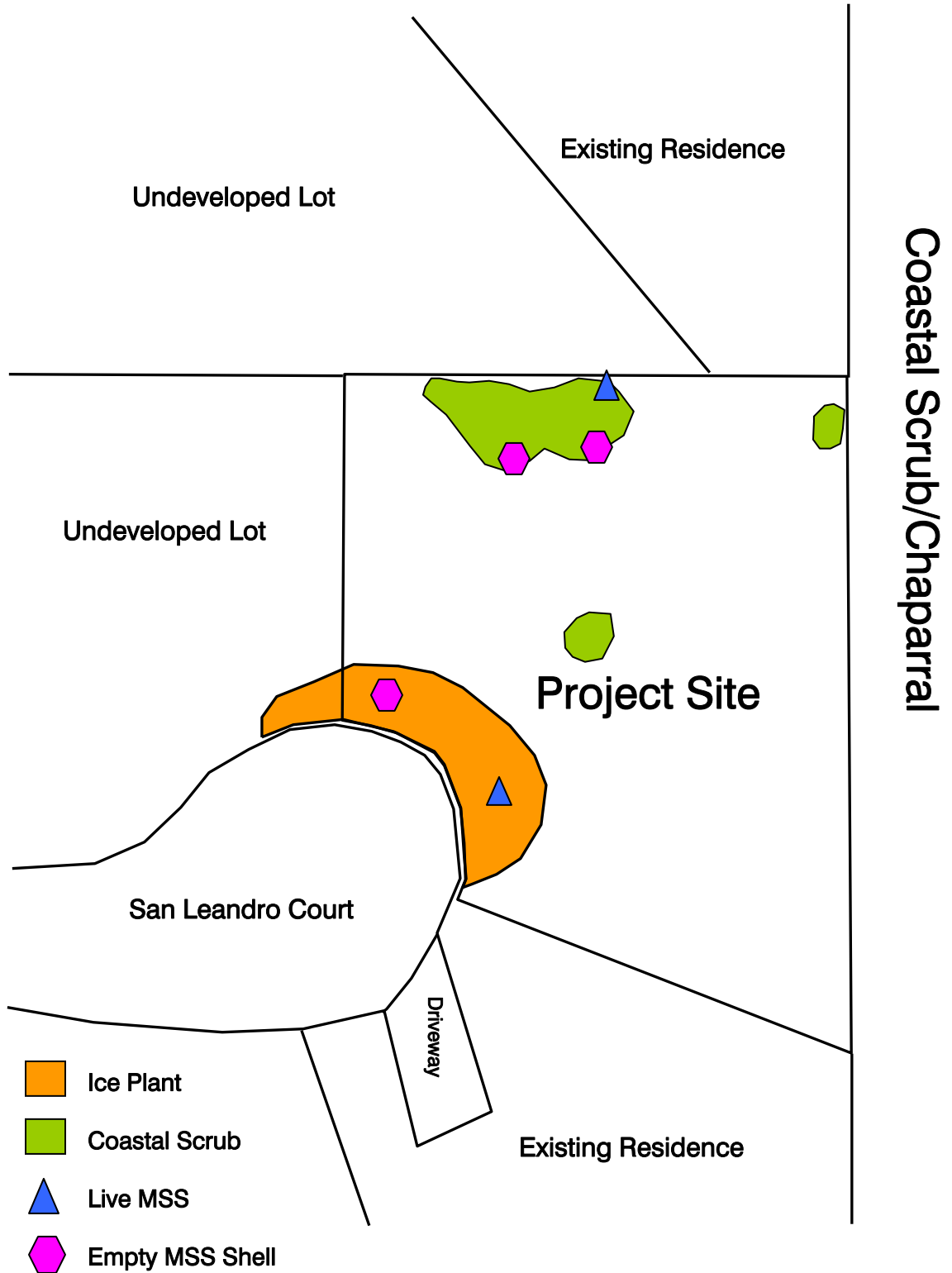




Photo 1:

Photo viewing east from the San Leandro cul-de-sac. Note ice plant on slope in foreground and scattered clumps of coastal scrub.

October 27, 2004



Photo 2:

Photo viewing northwest toward San Leandro cul-de-sac. Note ice plant on slope in back ground (left) and scattered clumps of coastal scrub.

October 27, 2004

## PHOTO DOCUMENTATION ATTACHMENT A



**Photo 1:**

View from middle portion of 5.08-acre parcel looking east toward Seahorse Lane. The proposed driveway alignment would pass through this area.

Picture taken July 28, 2008.



**Photo 2:**

View from Seahorse Lane looking west toward the proposed house location on the 5.08-acre lot. The proposed driveway alignment would pass between the two Morro manzanita indicated by arrows.

Picture taken July 28, 2008.

## PHOTO DOCUMENTATION



**Photo 3:**

View of proposed house location on the 5.08-acre lot, looking west.

Picture taken July 28, 2008.



**Photo 4:**

View of southern portion of the proposed restoration area, looking west. Note sparse shrub growth, and scattered veldt grass clumps.

Picture taken July 28, 2008.

## PHOTO DOCUMENTATION



**Photo 5:**

View of 0.45-acre lot, looking north from the eastern property boundary. Note mowed veldt grass and scattered clumps of chamise and iceplant.

Picture taken July 28, 2008.

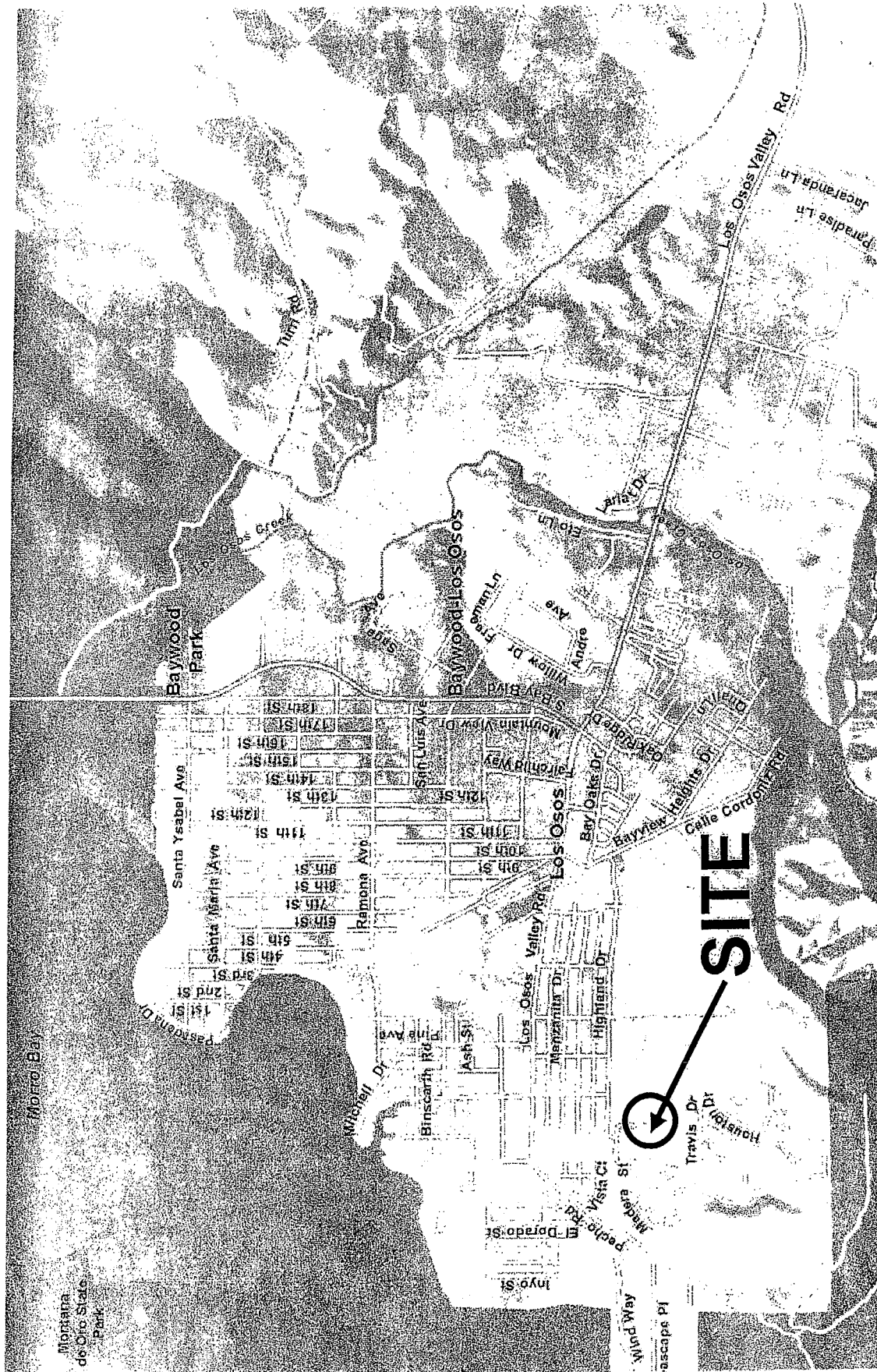


**Photo 6:**

View of eastern portion of 0.45-acre lot, looking east from San Leandro Court. Note densely vegetated 5.08-acre lot in background.

Picture taken July 28, 2008.

## PHOTO DOCUMENTATION



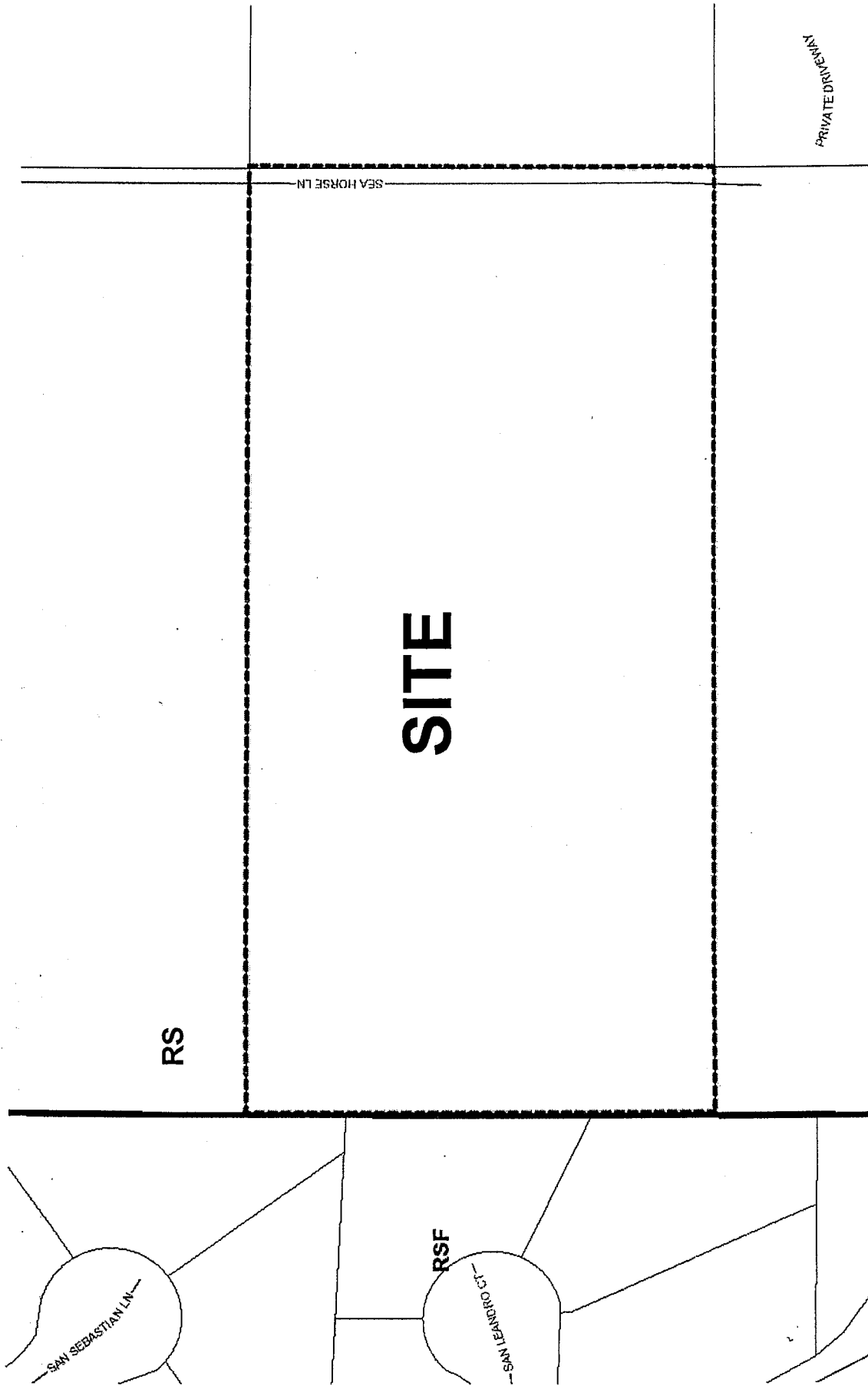
EXHIBIT

Vicinity Map



PROJECT

Minor Use Permit  
D990336P / Kellaway



EXHIBIT

Land Use Map

PROJECT

Minor Use Permit  
D990336P / Kellaway

SITE



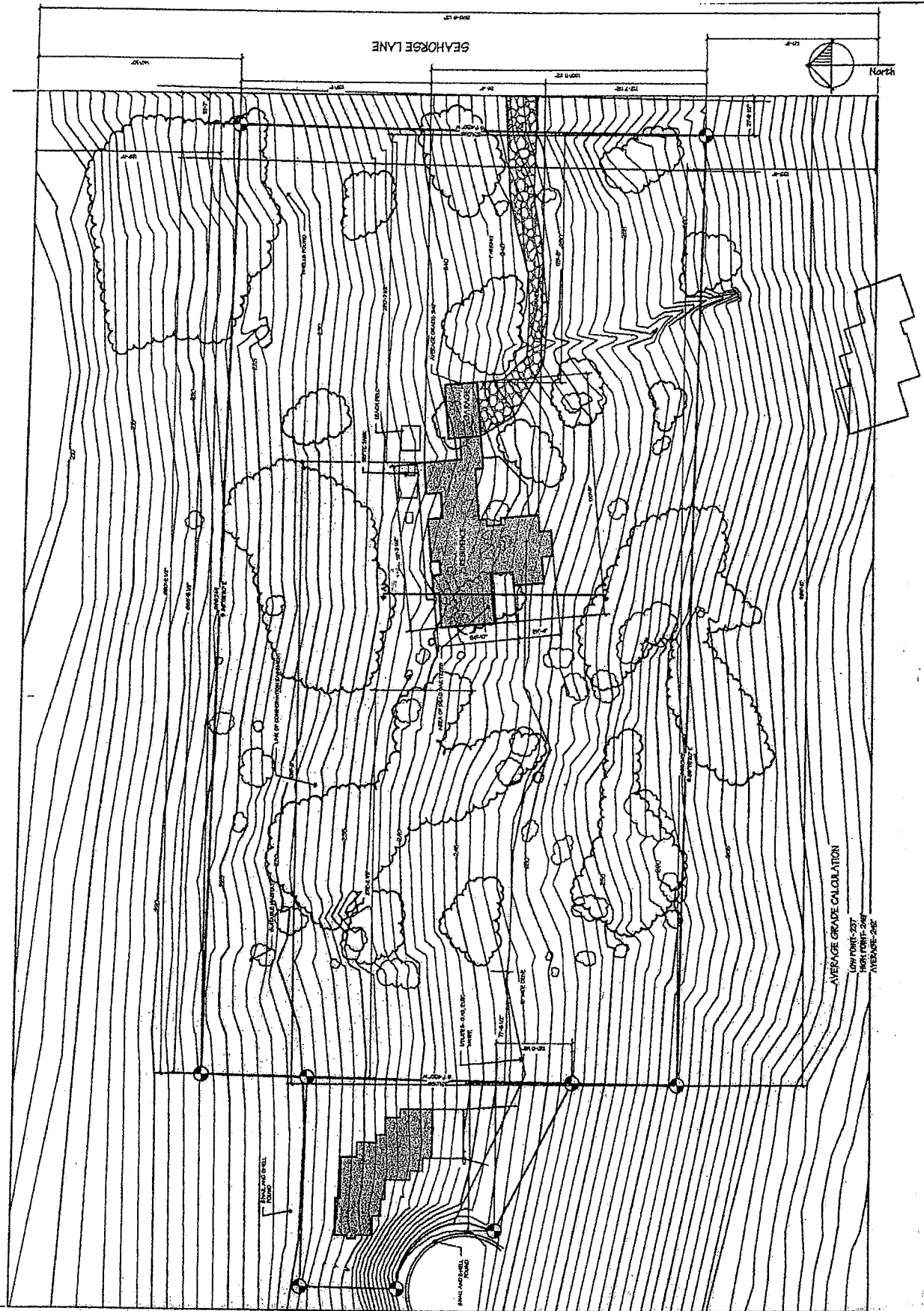
PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

Aerial





EXHIBIT

Site Plan



PROJECT

Minor Use Permit  
 D990336P / Kellaway

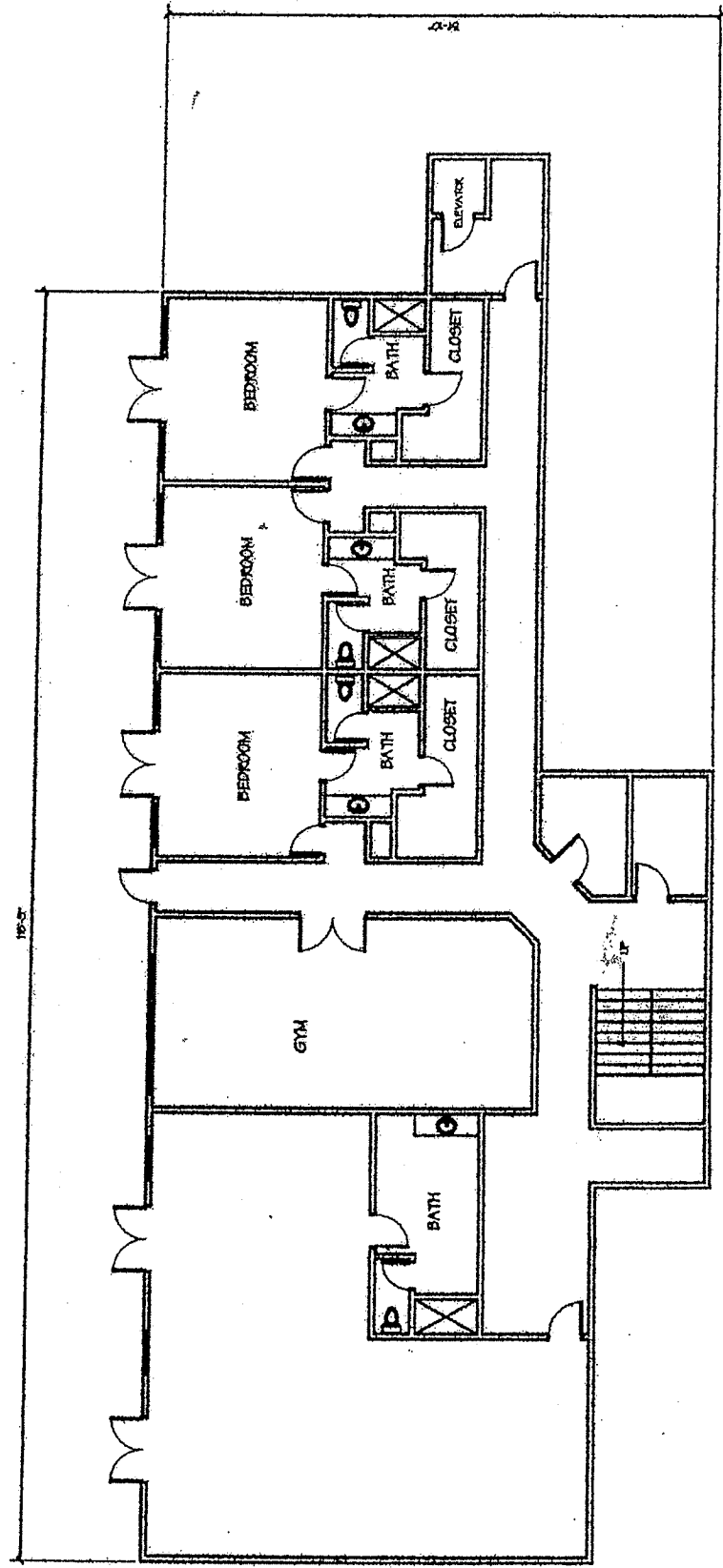


Conserved areas



## PROJECT

**Minor Use Permit  
D990336P / Kellaway**



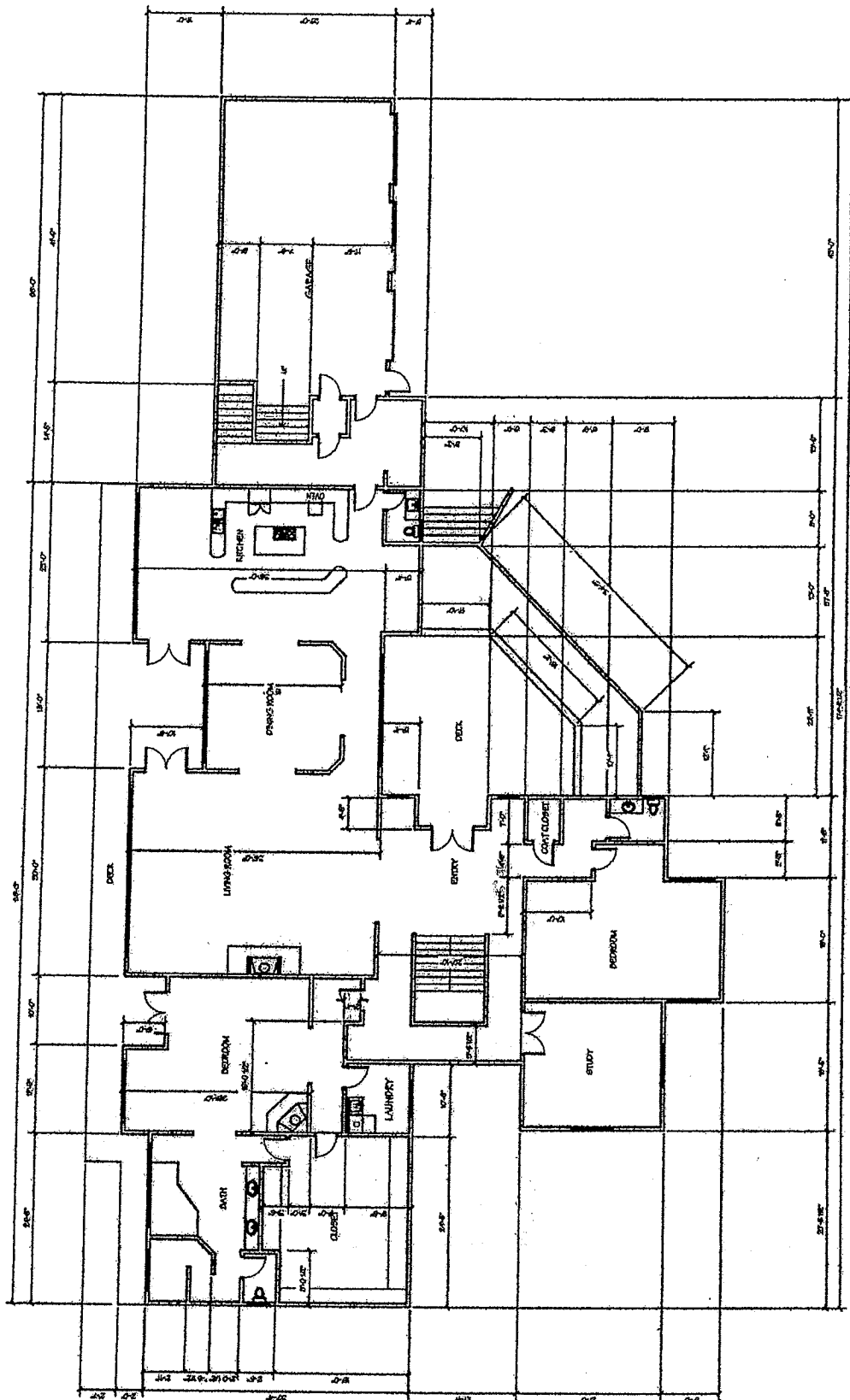
EXHIBIT

First Floor Plan

PROJECT

Minor Use Permit  
D990336P / Kellaway





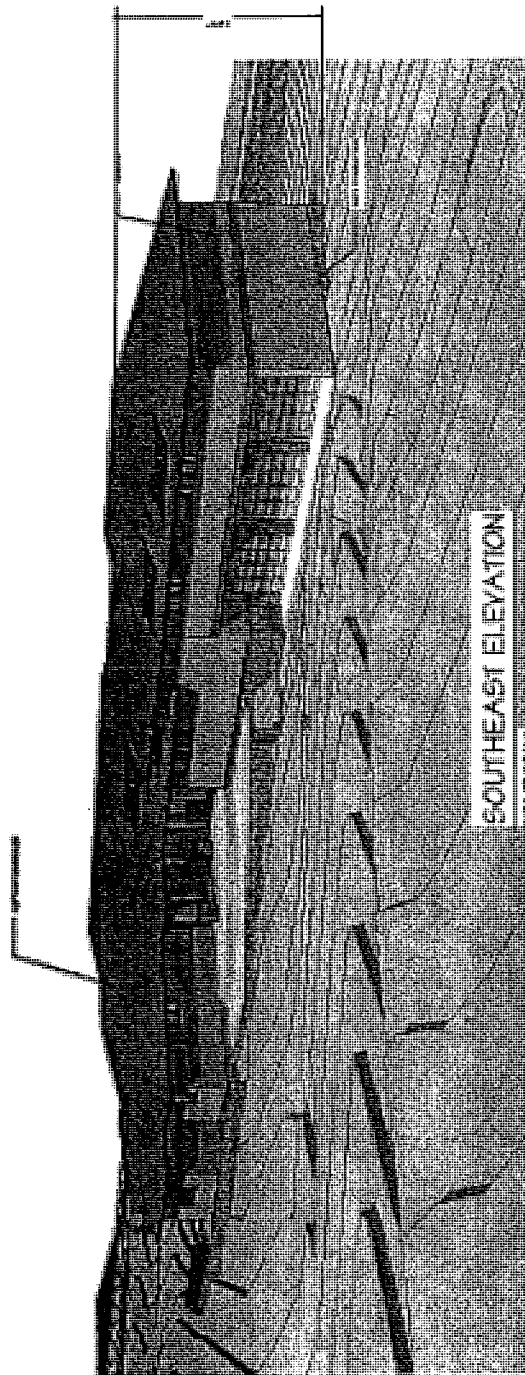
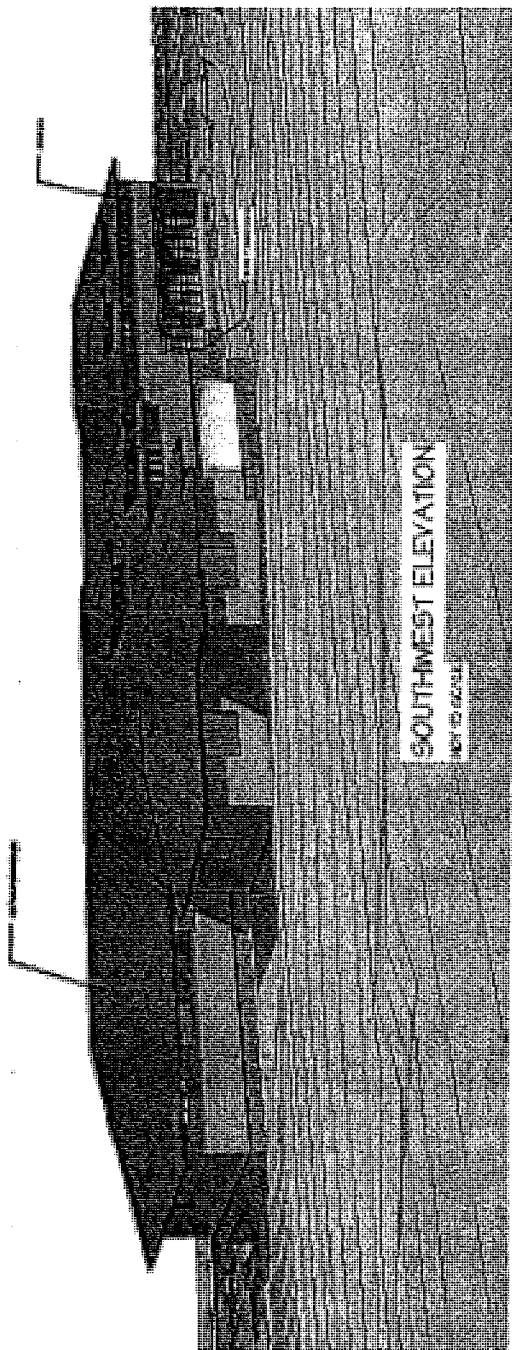
PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

Second Floor





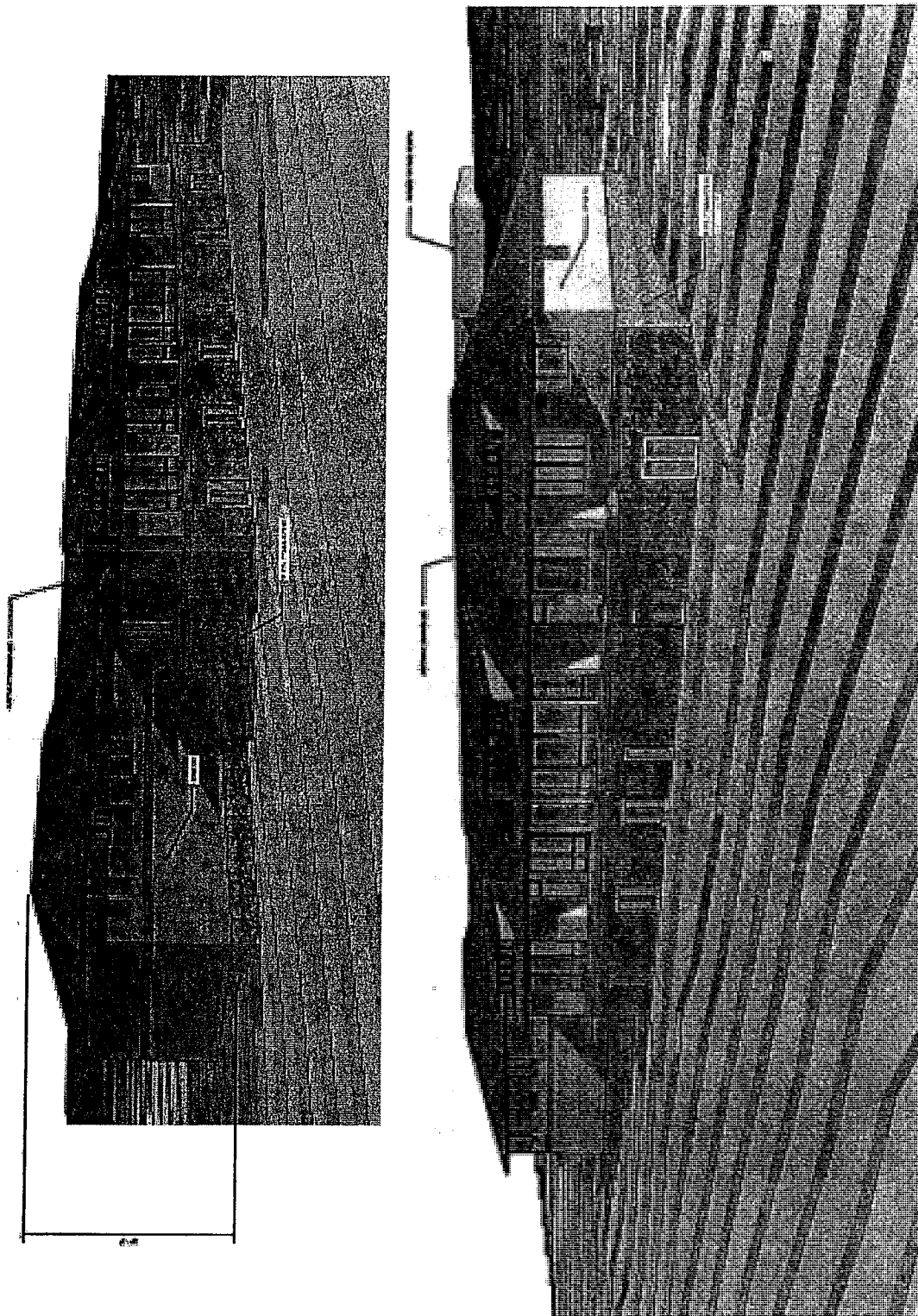
PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

Elevations





NOT

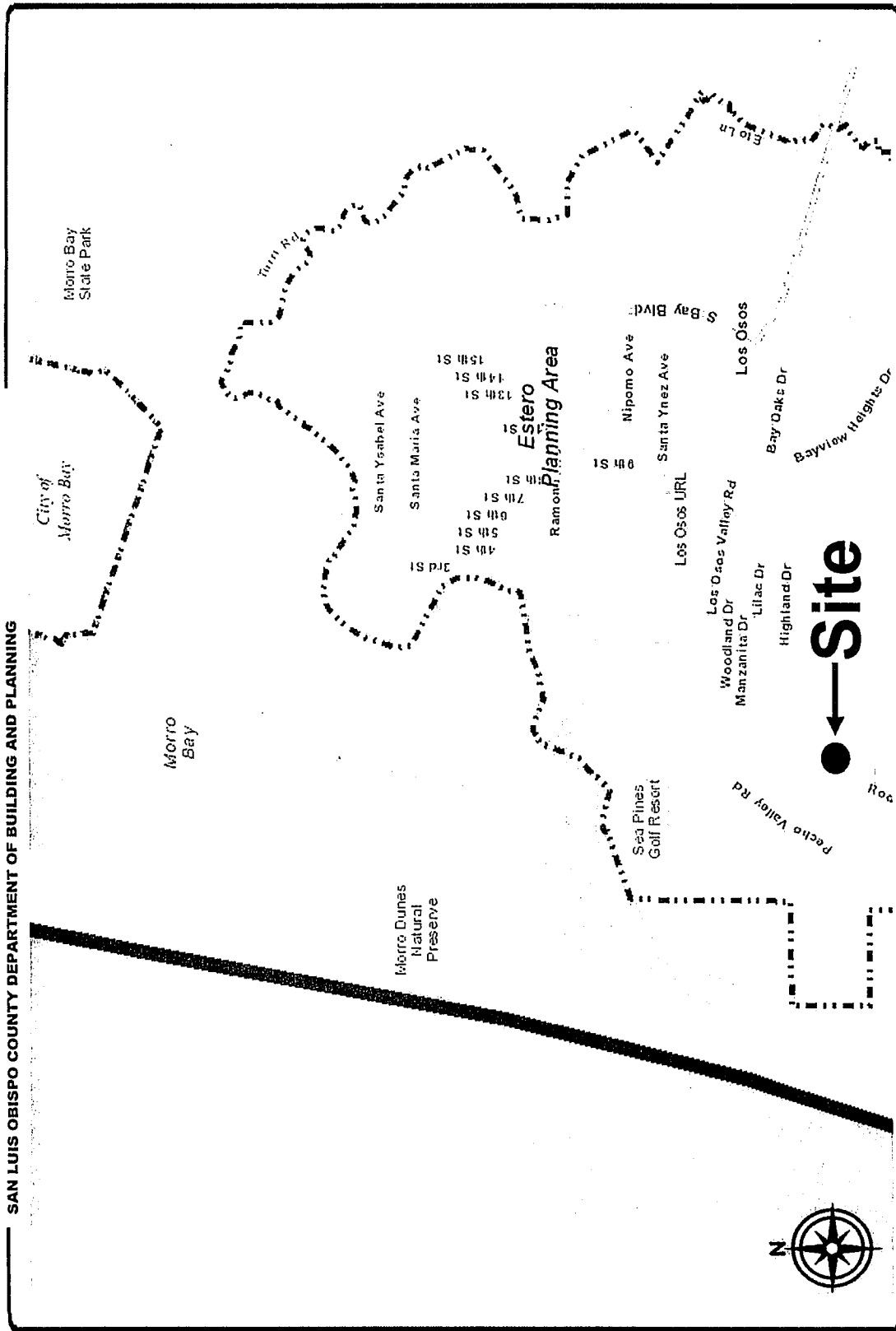
PROJECT

Minor Use Permit  
D990336P / Kellaway

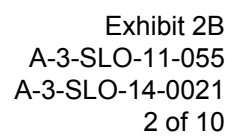


EXHIBIT

Elevations

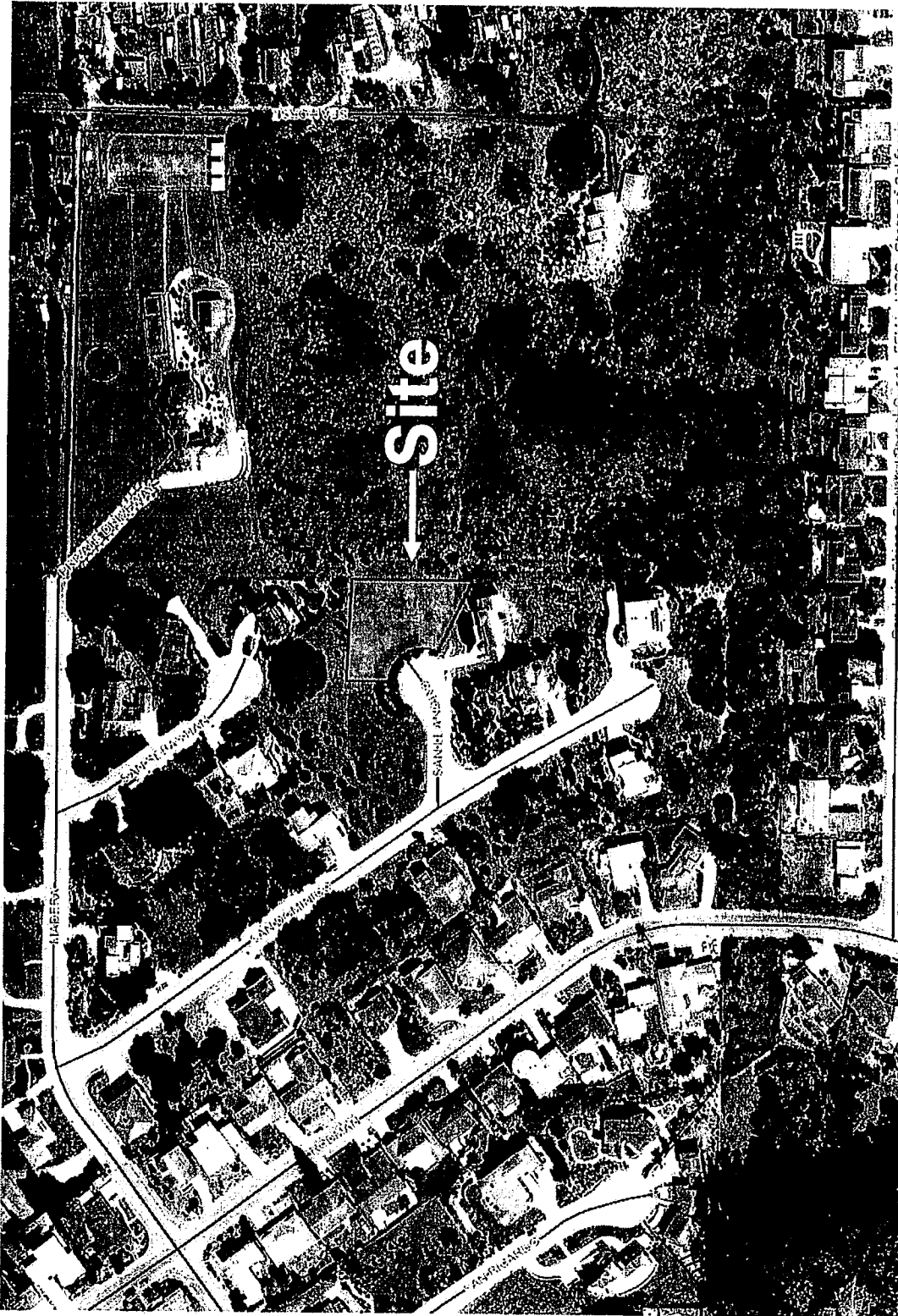


PROJECT	EXHIBIT
Minor Use Permit 7 Tracks Realty / D010041P	Vicinity Map





SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING



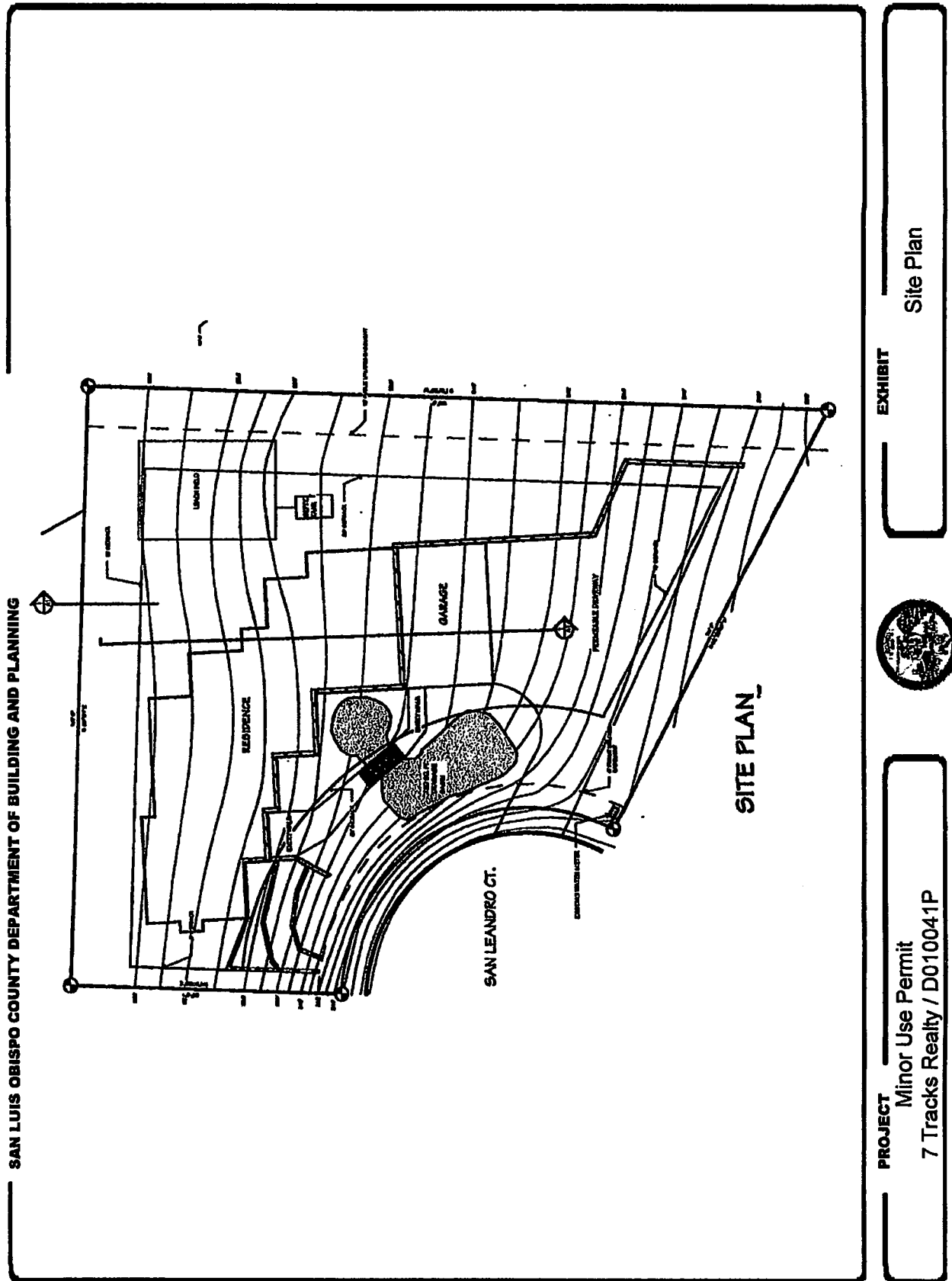
PROJECT

Minor Use Permit  
7 Tracks Realty / D010041P



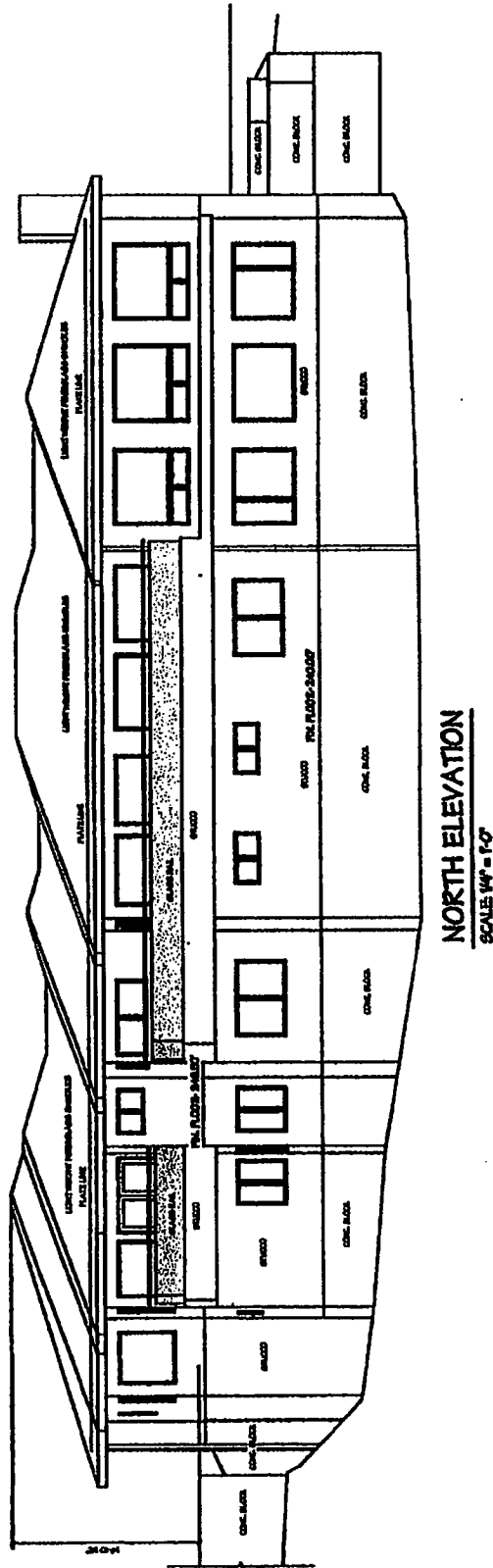
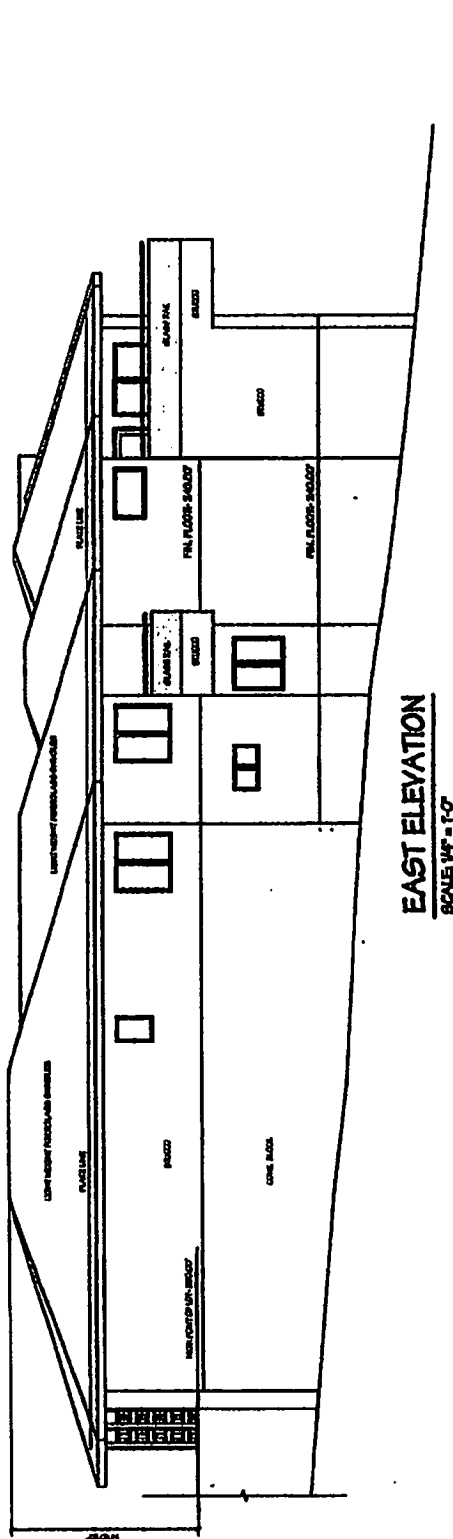
EXHIBIT

Aerial Close-Up





SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING



PROJECT

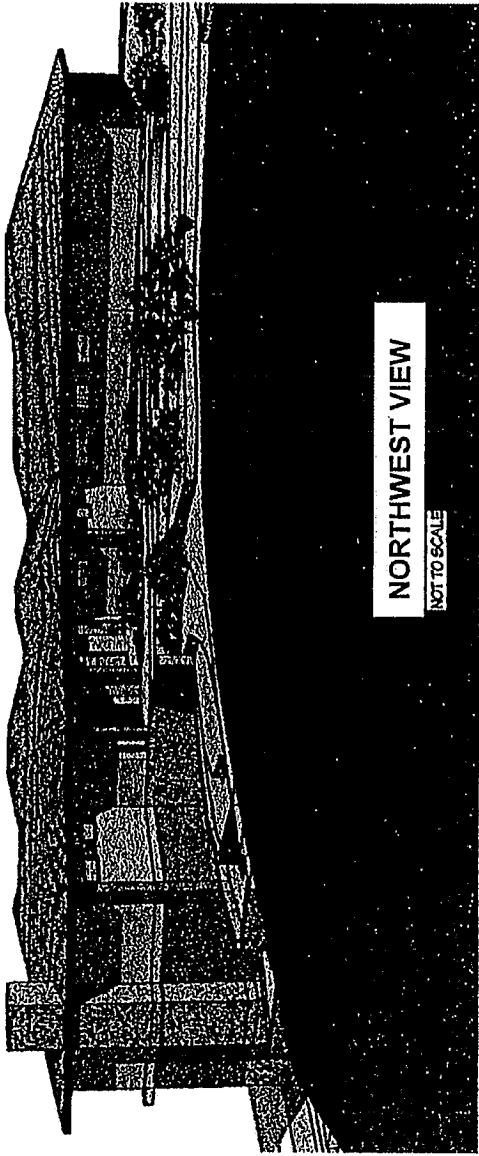
Minor Use Permit  
7 Tracks Realty / D010041P

EXHIBIT

Exterior Elevations – East and North

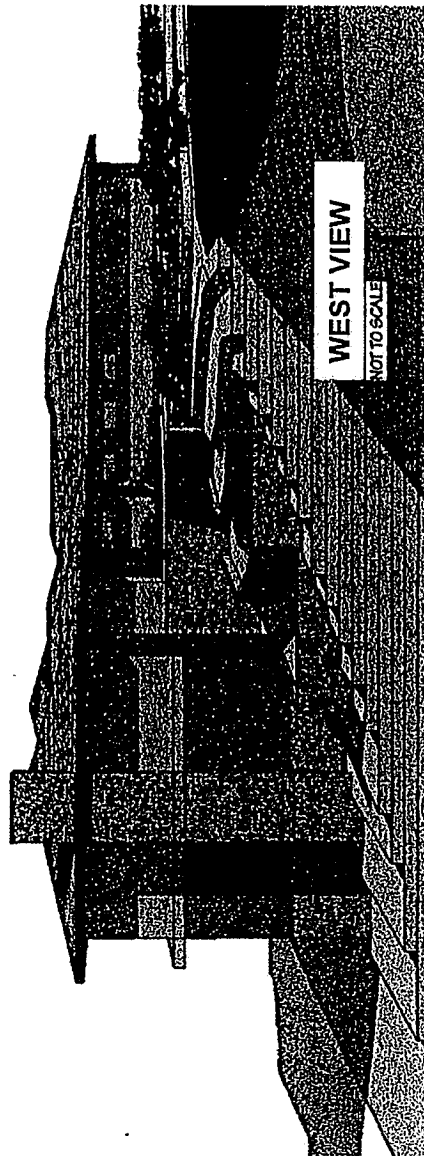


SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING



NORTHWEST VIEW

NOT TO SCALE



WEST VIEW

NOT TO SCALE

PROJECT

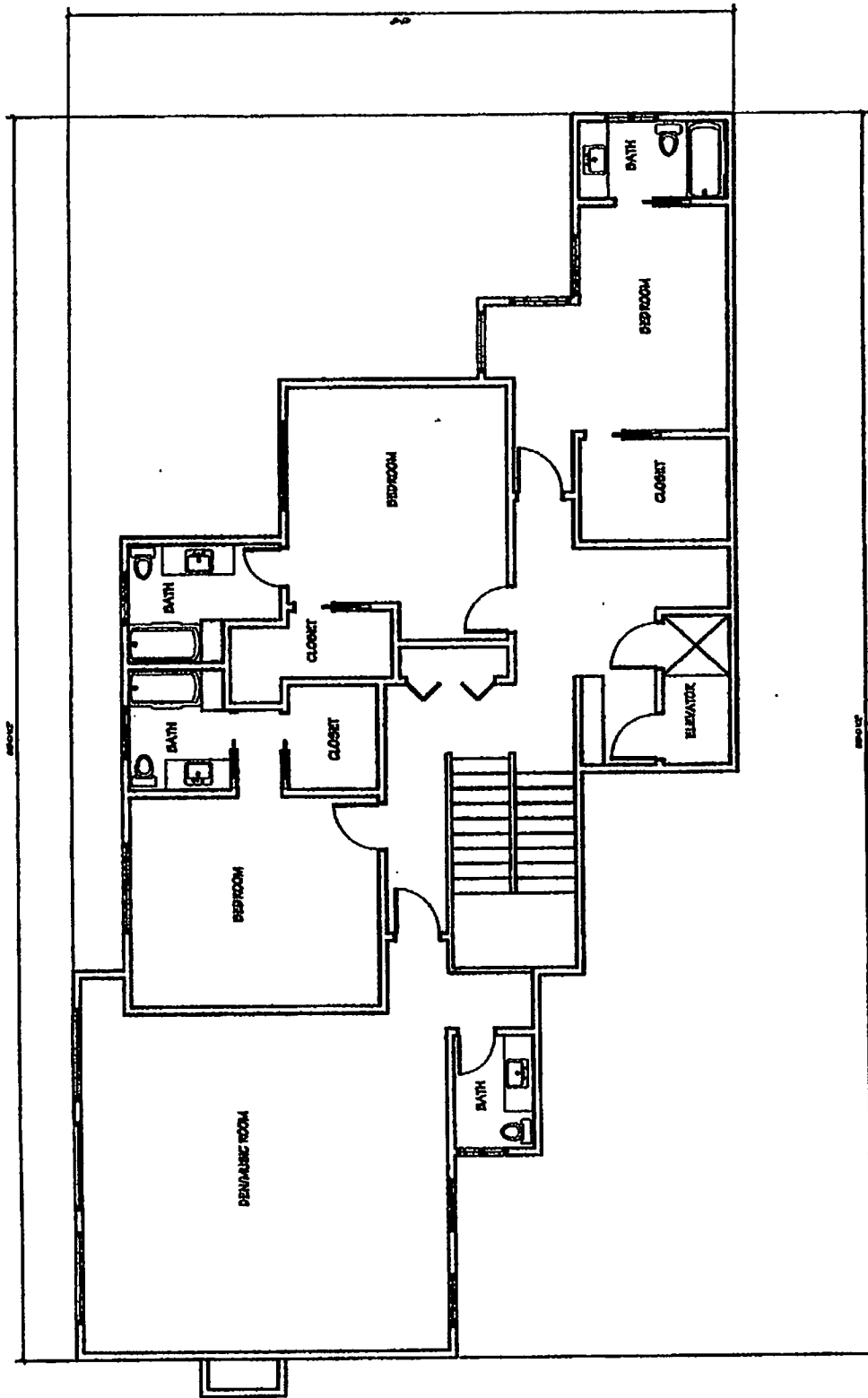
Minor Use Permit  
7 Tracks Realty / D010041P



EXHIBIT

Exterior Views – North West and West

SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING



EXHIBIT

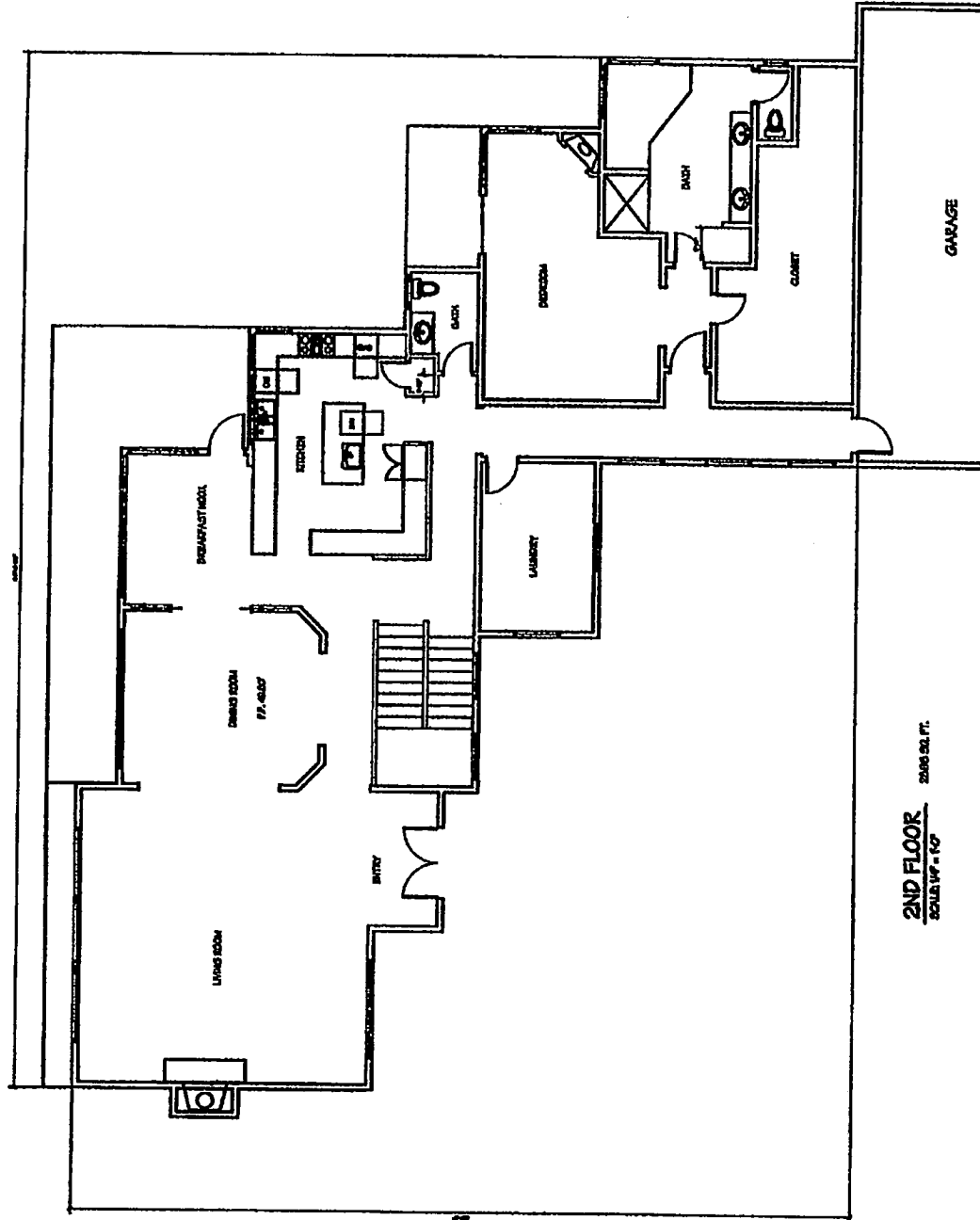
Floor Plan— 1<sup>ST</sup> Floor



PROJECT

Minor Use Permit  
7 Tracks Realty / D010041P

SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING



2ND FLOOR  
SQUARE FT. 2,000 SQ. FT.

PROJECT

Minor Use Permit  
7 Tracks Realty / D010041P



EXHIBIT

Floor Plan- 2nd Floor

# Exhibit 3: Selected SLO LCP Policies

## POLICIES FOR PUBLIC WORKS

The following public works policies address and implement Coastal Act provisions concerning public services and capacities.

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

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

- a. It can be serviced by adequate private on-site water and waste disposal systems; and
- b. The proposed development reflects that it is an environmentally preferable alternative.

The applicant shall assume responsibility in accordance with county ordinances or the rules and regulations of the applicable service district or other providers of services for costs of service extensions or improvements that are required as a result of the project. Lack of proper arrangements for guaranteeing service is grounds for denial of the project or reduction of the density that could otherwise be approved consistent with available resources. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.04.021c (DIVISIONS OF LAND), 23.04.430 AND 23.04.432 (OTHER DEVELOPMENT) OF THE CZLUO.]

[Amended 2004, Ord. 3006]

### **Policy 2: New or Expanded Public Works Facilities**

New or expanded public works facilities shall be designed to accommodate but not exceed the needs generated by projected development within the designated urban reserve lines. Other special contractual agreements to serve public facilities and public recreation areas beyond the urban reserve line may be found appropriate. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.04.430 OF THE CZLUO.]

### **Policy 3: Special Districts**

The formation or expansions of special districts shall not be permitted where they would encourage new development that is inconsistent with the Local Coastal Program. In participation on LAFCo actions, the county should encourage sphere-of-influence and annexation policies which reflect the Local Coastal Program. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD.]

### **Policy 4: Urban Service Line Amendments**

Amendments to an urban service line must be found consistent with the Coastal Act and the Local Coastal Program. Approval of LCP amendment by the Coastal Commission or its successor in interest is required. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD.]

**Resource Conservation Districts.** Coastal San Luis Resource Conservation District is authorized to develop general conservation plans for practices associated with agriculture, recreation, urban development and watershed to preserve water and soil resources. The districts have no regulatory powers and serve only an advisory role.

**Soil Conservation Service (SCS).** The Soil Conservation Service is responsible for developing and carrying out national soil and water conservation programs. The service is mandated to prevent erosion and control floods by providing technical assistance to other agencies and property owners. The SCS has no regulatory powers and serves in only a purely advisory manner.

**Cooperative Extension Service.** The Cooperative Extension is managed by the University of California. The service provides for the improvement of agricultural production and practices through its research and educational program. The Cooperative Extension Service has no regulatory powers.

**Army Corps of Engineers.** The Army Corps of Engineers requires permits on certain streams for depositing of materials within the stream. In addition, the Corp requires permits for activities within all navigable waters.

The county's primary role in watershed management is through approval of the location and design of new development. Setting of priorities for allocation of new development that is in coordination with available water resources can ensure protection of existing and potential agricultural viability. This must be balanced with phasing of urban growth and providing for priority uses under the Coastal Act including visitor-serving and other coastal-dependent uses. Policies regarding public works are found in the Public Works chapter.

The second role is concerned with control of erosion and sedimentation sources. Traditionally, watershed management concerns have not played an important role in development approval of small projects. Construction of single family homes on an existing lot is exempt from CEQA requirements, and the cumulative impacts of development often escape scrutiny. Once a site has been developed, the county's role in erosion and sedimentation control is minor.

The Coastal Zone Land Use Ordinance (CZLUO) establishes standards for new development concerning grading, drainage and other site alterations. The CZLUO adopted new grading and drainage plan requirements that will be tied to slope, area graded or paved, and flood and geologic study area considerations. These proposed ordinance requirements will fulfill the basin plan amendment requirements which requires local jurisdictions to enact ordinances consistent with the basin plan.

## **POLICIES FOR COASTAL WATERSHEDS**

To implement the provisions of the Coastal Act regarding watershed management, the following policies represent a commitment that all new development ensure watershed protection.

### **Policy 1: Preservation of Groundwater Basins**

The long-term integrity of groundwater basins within the coastal zone shall be protected. The safe yield of the groundwater basin, including return and retained water, shall not be exceeded except as part of a conjunctive use or resource management program which assures that the biological productivity of aquatic habitats are not significantly adversely impacted. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD.]

**Policy 2:****Water Extractions**

Extractions, impoundments and other water resource developments shall obtain all necessary county and/or state permits. All pertinent information on these uses (including water conservation opportunities and impacts on in-stream beneficial uses) will be incorporated into the data base for the Resource Management System and shall be supplemented by all available private and public water resources studies available. Groundwater levels and surface flows shall be maintained to ensure that the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organisms, and for the protection of human health. (Public works projects are discussed separately.) [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD.]

**Policy 3:        Monitoring of Resources**

In basins where extractions are approaching groundwater limitations, the county shall require applicants to install monitoring devices and participate in water monitoring management programs. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD AND PURSUANT TO SECTION 8.40.065 OF THE COUNTY CODE (WATER WELL REGULATIONS).]

**Policy 4:        Chorro and Morro Basins**

The county and the city of Morro Bay will jointly develop a groundwater management program which provides for agricultural demand and for phased urban growth consistent with available groundwater resources and with the protection of aquatic habitats. The Chorro and Morro groundwater basins have been identified as experiencing potential for seawater intrusion, usually during drought conditions. Development of a successful groundwater management program for these basins necessitates coordinating both urban and agricultural/rural extractions. The city of Morro Bay has completed an investigation of the groundwater capacity of these basins. (*City of Morro Bay, Preliminary Water Management Plan*, February, 1981.) This includes the evaluation of existing and potential agricultural demand. A variety of management techniques are suggested, including development of recharge basins, well site relocations and use of reclaimed water to satisfy agricultural demands.

In the interim, before development of a management program, to ensure that agricultural and residential demand doesn't negate the alternative management strategies, or adversely impact aquatic habitats, all development which would cause an intensification of groundwater use in the basins shall be evaluated for conformity with the recommended management techniques and the protection of aquatic habitats. This will apply where a development project would require more than one acre-foot of water annually.

A county/city program shall be established which would result in the following:

- a. Referral of any division of land, permit activity or grading in the Morro and Chorro watershed within the city of Morro Bay's Sphere of Influence, as contained in the coastal zone boundary, to the city for review and comment.
- b. Consideration of "Best Management Practices" during the review of permit application on agricultural parcels or parcels suitable for agricultural use in order to control agricultural practices that would result in sedimentation, contamination of the groundwater basin, misuse of water resources or otherwise adversely affect the groundwater basins.
- c. Water basin management planning in cooperation with other affected agencies.

[THIS POLICY SHALL BE IMPLEMENTED AS A PROGRAM EXCEPT THAT PARAGRAPH 2 SHALL BE IMPLEMENTED AS A STANDARD.]

- (4) Public access may be restricted if it is determined that the area is extremely degraded and time is needed to allow recovery of vegetation. Access may be restricted by temporary barriers such as fencing, with signs explaining the restriction. The degree of access and restrictions will be determined by the Planning Director after consultation with the property owner and affected public agencies. At the time of such restriction a date shall be set for removal of such barriers and signs. On or before that date, the Planning Director shall review the progress of recovery and may extend the restriction.

**k. Sighting criteria for coastal accessway.** In reviewing a proposed accessway, the applicable review body shall consider the effects that a public accessway may have on adjoining land uses in the location and design of the accessway. When new development is proposed, it shall be located so as not to restrict access or to create possible privacy problems. Where feasible, the following general criteria shall be used in reviewing new access locations, or the location of new development where coastal access considerations are involved:

- (1) Accessway locations and routes should avoid agricultural areas, sensitive habitats and existing or proposed residential areas by locating near the edge of project sites;
- (2) The size and location of vertical accessways should be based upon the level and intensity of existing and proposed access;
- (3) Review of the accessway shall consider: safety hazards, adequate parking provisions, privacy needs of adjacent residences, adequate signing, and levels of improvements necessary to provide for access;
- (4) Limiting access to pass and repass should be considered where there are nearby residences, where topographic constraints make the use of the beach dangerous, where there are habitat values that can be disturbed by active use.

[Amended 1995, Ord. 2715; 2004, Ord. 2999]

#### **23.04.430 - Availability of Water Supply and Sewage Disposal Services.**

A land use permit for new development that requires water or disposal of sewage shall not be approved unless the applicable approval body determines that there is adequate water and sewage disposal capacity available to serve the proposed development, as provided by this section. Subsections a. and b. of this section give priority to infilling development within the urban service line over development proposed between the USL and URL. In communities with limited water and sewage disposal service capacities as defined by Resource Management System alert levels II or III:

- a.** A land use permit for development to be located between an urban services line and urban reserve line shall not be approved unless the approval body first finds that the capacities of available water supply and sewage disposal services are sufficient to accommodate both existing development, and allowed development on presently-vacant parcels within the urban services line.
- b.** Development outside the urban services line shall be approved only if it can be served by adequate on-site water and sewage disposal systems, except that development of a single-family dwelling on an existing parcel may connect to a community water system if such service exists adjacent to the subject parcel and lateral connection can be accomplished without trunk line extension.

Each type of resource has unique characteristics that require a different approach to establishing levels of severity for it. This section describes the regional policy issues for resources and the criteria to be used to identify when each level of severity is reached. Table F provides a brief summary of the criteria. Each resource topic also includes recommended subjects for resource capacity studies that will be prepared through the RMS advisory process.

**TABLE F**  
**RESOURCE DEFICIENCY CRITERIA FOR LEVELS OF SEVERITY**

Resource	Level 1	Level II	Level III
1. Water Supply			
a. Water Resource	Projected consumption estimated to exceed dependable supply within 9 years.	7 year lead time to develop supplementary water for delivery to users	Resource is being used at or beyond its estimated dependable supply or will deplete dependable supply before new supplies can be developed.
b. Water System	System projected to be operating at design capacity within 7 years	5 year lead time to complete major improvements	System operating at or beyond design capacity or will be at capacity before improvements are constructed
2. Sewage Disposal			
a. Treatment Plant	Projected average daily flow = plant capacity within 6 years	5 year projected average daily flow = plant capacity	Average daily flow = plant capacity or the plant will be at capacity before improvements can be made
b. Sewage Collection Lines and Lift Stations	Projected flow will equal 90% of system capacity within 2 years	System at 90% capacity; or 5 year projected flow equals capacity; or LUE Absorption capacity effluent would exceed system capacity	System operating at 100% capacity or will be at capacity before improvements can be made
c. Individual Septic Tank Systems	System failures reach 5% by area; RWQCB, Health or Engineering Departments to identify potential health problems	System failure rate reaches 15% by area or community	System failures at 25%; threat to public health and safety exists. 5 years needed to build public sewer system
3. Schools	7 year projected enrollment will be at or above maximum students/classroom ratio established by school district	5 year projected enrollment will be at or above maximum student/classroom ratio	Enrollment at or above maximum student/classroom ratio
4. Roads/ Circulation	Projected traffic volume will reach Level of Service (LOS) D within 5 years	Route will be operating at LOS-D in 2 years or less	Route is operating at LOS-D, (as defined in the 1985 Highway Capacity manual)
5. Air Quality	Infrequent violations of the federal ozone standard, or emissions reach 75% of the standard, or offsets are reduced to less than 50% of baseline levels	Periodic violations of the federal and state ozone standard, or emissions reach 90% of the designated threshold, or offsets are reduced to 25% of baseline levels	Federal ozone standard is exceeded one or more days within three consecutive years, or emissions regularly exceed the standard, or offsets have been depleted

## Water Supply

### Policy Issues

Water resources have long been a widespread concern in the coastal zone. Major concerns associated with water resources include issues of distribution as well as issues of new supply development. The problem in this county is that potable, plentiful water sources often are not conveniently located for ready distribution to existing urban areas. If the county is to grow beyond the present level, supplemental water resources (including new facilities for distribution of existing remote sources) will be needed.

The most basic policy issue regarding county water resources is how existing supplies should be developed and distributed. The distribution issue regards whether the apparent overdrafting of groundwater in some basins should continue, or whether consumption should be limited to levels within each basin's dependable supply. Goals are stated in Chapter 1 that support balancing the Land Use Element's capacity for growth with the long-term availability of resources. Some groundwater basins are large enough to provide a supply for many years, yet early corrective actions will avoid the effects of a reduced supply that will otherwise become apparent. Overdrafting (or mining) of a groundwater basin can be corrected once it starts through management of water use, but it is complicated and difficult to do so. Besides water conservation, management of the location, density and rate of development can minimize the increased use of the basin and provide lead time for developing supplemental sources. Imported water supplies can be provided to replace overdrafting that would otherwise occur, instead of adding more water to use with increased overdrafting. Besides the cumulative extent of overdrafting caused by the policies of the Land Use Element, the timing and role of supplemental water supplies will affect how serious a problem overdrafting of groundwater could become.

The major water distribution questions are:

1. Whether limited supplies should be consciously divided between urban use and agricultural use; and
2. Whether water should be transported from one basin to serve another.

The question of agricultural and urban water use is likely to become more important over time because urban and agricultural users most often draw from a single groundwater source, and agriculture generally requires significantly more water than urban use. Where formal groundwater management may need to be considered in some areas of the county, agriculture's essential use of this natural resource should have priority. Where a change in the distribution of water does not adequately provide for agricultural production, it may be appropriate to consider a change of the land use category to allow non-agricultural uses.

The Engineering Department has estimated that, countywide, capacities and locations of presently developed water supplies serve a population of approximately 150,000. However, the county population was estimated to be 198,220 in 1987. The dependable supply is about 138,000 acre-feet per year, and demand exceeds this supply by 70,000 acre-feet per year. This demand is currently being met by overdrafting some of the groundwater basins. Although this may be an acceptable short-term solution, continued overdrafting of the groundwater basins can lead to serious consequences in the future.

In March, 1986, the county completed a new version of the Master Water Plan. This plan examines alternative supplemental water sources including:

1. The state water project
2. Utilization of water from Lake Nacimiento
3. Construction of dams on local creeks
4. Desalinization/demineralization
5. Reclamation of wastewater
6. Water conservation

The Master Water Plan identifies the State Water Project as the least costly alternative. Its maximum entitlement is 25,000 acre-feet per year, and some portion would recharge groundwater basins as wastewater. Even with the development of the state water project, overdrafting of the basins will continue to occur given the current deficit in the water supply. The Master Water Plan proposes a series of other supplemental water supply projects to reduce this deficit. However, commitments are needed from water providers that they would stop or reduce groundwater withdrawals once they obtain supplemental supplies in order to make a meaningful reduction in overdrafting. Otherwise, supplemental water supplies would not replace groundwater extraction, but would serve more development and not significantly improve the existing deficit situation.

### **Water Supply Criteria**

#### **Water Resources**

A Level of Severity III exists when water demand equals the available resource; the amount of consumption has reached the dependable supply of the resource. A Level III may also exist if the time required to correct the problem is longer than the time available before the dependable supply is reached.

Level II for a water resource occurs when water demand projected over seven years (or other lead time determined by a resource capacity study) equals or exceeds the estimated dependable supply. Seven years is the estimated minimum time required to develop a major supplementary water resource to the point of delivery to users.

Level I is reached for a water resource when increasing water demand projected over nine years equals or exceeds the estimated dependable supply. Level I provides two years for preparation of resource capacity studies and evaluation of alternative courses of action.

#### **Resource Capacity Study**

A Resource Capacity Study should: 1) inventory existing water resources available to the agency operating the system; 2) document existing demand for water by all area user-groups; and 3) explore any conservation measures that could reasonably be imposed by the water agency.

#### **Water Systems**

Level III exists for a water supply system when water demand equals available capacity; in this case when a water distribution system is functioning at design capacity, or will be functioning at capacity before improvements can be made. The capacity of a water system is the design capacity of its component parts: storage, pipelines, pumping stations and treatment plants.

Level II for a water system occurs at the beginning of the five-year lead time (or other lead time determined by a resource capacity study) needed to design, fund and construct system improvements necessary to avoid a Level III problem.

**23.04.432 - Development Requiring Water or Sewer Service Extensions.**

To minimize conflicts between agricultural and urban land uses, development requiring new community water or sewage disposal service extensions beyond the urban services line shall not be approved.

**23.04.440 Transfer of Development Credits - Cambria.**

The purpose of this section is to implement portions of the Cambria/Lodge Hill Transfer of Development Credits Program (TDC) by providing a procedure to allow simple transfers within the Lodge Hill area of the community of Cambria. Consistent with applicable planning area programs and standards of the Land Use Element, the objective of this section is to reduce potential buildout in sensitive areas of Lodge Hill called "Special Project Areas." Through transfer of development credits, allowable building area (expressed in square footage) for lots within a special project area may be transferred to more suitable sites within Lodge Hill. A lot from which development credits have been transferred is "retired", and loses its building potential through recordation of permanent conservation easement or other document. A residence on a "receiver" lot may thus be developed with larger dwellings than would otherwise be allowed by planning area standards.

- a. **Where allowed.** Development credit transfers shall occur only on parcels located within the Lodge Hill area (east and west) as defined by Figure 3, Cambria Urban Area, Part II of the Land Use Element. Lots being retired for purposes of a transfer shall be located within a special project area as shown on Figure 3. In no case shall a development credit be transferred to a building site within a special project area from outside the area. Lots within a special project area may qualify for additional dwelling square footage only by retiring lot(s) within a special project area.
- b. **Permit requirement.** Minor Use Permit for the proposed dwelling and site receiving the additional allowed square footage. No permit requirement for the lot to be retired into open space.
- c. **Required findings.** The Planning Director or applicable appeal body shall not approve a Minor Use Permit for a residence to be constructed with additional square footage gained through TDC until the following findings have been made:
  - (1) Adequate instruments have been executed to assure that lot(s) to be retired will remain in permanent open space and that no development will occur; and
  - (2) The "receiver" site can accommodate the proposed scale and intensity of development without the need for a variance (23.01.045), exception to height limitations (23.04.124b) or modification to parking standards (23.04.162h); and
  - (3) The circumstances of the transfer are consistent with the purpose and intent of the applicable planning area programs and standards regarding transfer of development credits.
- d. **Eligible purchasers of TDC's.** Owners of small lots within Lodge Hill may be allowed to construct a larger residence than would otherwise be allowed by the planning area standards of the Land Use Element through participation in the TDC program. Larger residences may be constructed on a "receiver" lot through purchase of available square footage from a non-profit corporation organized for conservation purposes.

**Erosion Control.** Uncontrolled erosion through natural or development activities can threaten the stability of an environmentally sensitive area. Specific recommendations for erosion control are discussed in the Watershed chapter.

Other habitat types pose individualized needs and demand special management strategies. Coastal streams that serve as anadromous fish habitats are susceptible to impacts from surrounding properties. In-stream alterations, riparian vegetation removal, water diversions and pollution contribute to the need to protect streams that provide fish and other habitat values.

A second unique concern is the impact of off-road vehicles on habitat areas. Uncontrolled ORV use of bayfront areas and the coastal dunes can damage the habitat of a variety of species. Where this access is appropriate, it must be provided at a level which is consistent with the carrying-capacity of the area.

The recommendations of the Local Coastal Program address these concerns by ensuring protection of environmentally sensitive habitat areas, by establishing programs, policies, standards and ordinances.

## **POLICIES FOR ENVIRONMENTALLY SENSITIVE HABITATS**

### **A. SENSITIVE HABITATS**

Environmentally sensitive habitat areas are settings in which plant or animal life (or their habitats) are rare or especially valuable due to their special role in an ecosystem. Designation of environmentally sensitive habitats include but are not limited to: 1) wetlands and marshes; 2) coastal streams and adjacent riparian areas; 3) habitats containing or supporting rare and endangered or threatened species; 4) marine habitats containing breeding and/or nesting sites and coastal areas used by migratory and permanent birds for resting and feeding. The Coastal Act provides protection for these areas and permits only resource-dependent uses within the habitat area. Development adjacent must be sited to avoid impacts. While each of these habitat types is discussed in greater detail, general policies for protection of habitats are as follows:

#### **Policy 1: Land Uses Within or Adjacent to Environmentally Sensitive Habitats**

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

#### **Policy 2: Permit Requirement**

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

**Policy 3:****Habitat Restoration**

The county or Coastal Commission should require the restoration of damaged habitats as a condition of approval when feasible. Detailed wetlands restoration criteria are discussed in Policy 11. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.170 OF THE CZLUO.]

**Policy 4: No Land Divisions in Association with Environmentally Sensitive Habitats**

No divisions of parcels having environmentally sensitive habitats within them shall be permitted unless it can be found that the buildable area(s) are entirely outside the minimum standard setback required for that habitat (100 feet for wetlands, 50 feet for urban streams, 100 feet for rural streams). These building areas (building envelopes) shall be recorded on the subdivision or parcel map. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.170 OF THE CZLUO.]

**Policy 5: Supporting Greenbelt Formation and Maintenance**

The county shall continue programs and policies that support greenbelt and open space areas on the urban fringe of coastal communities. In conjunction with the development of Habitat Conservation Plans (HCP's), certain greenbelt areas may be suitable as habitat mitigation banks to help offset impacts from development in adjacent urban areas. Other areas may be best utilized for open space, agriculture, or public recreation. Mitigation banking shall be further evaluated as a potential implementation mechanism. [THIS POLICY SHALL BE IMPLEMENTED AS A PROGRAM.]

[Added 2004, Ord. 3006]

**Policy 6: Off-Site Mitigation Bank for Urban Development**

The county shall participate in creating a program (e.g. through the update of area plans) that would allow development to occur on sites in urban areas that contain sensitive species habitat but do not represent long-term viable habitat in exchange for participation in an off-site mitigation program. [THIS POLICY SHALL BE IMPLEMENTED AS A PROGRAM.]

[Added 2004, Ord. 3006]

**B. WETLANDS**

Coastal wetlands, tidal marshes, mudflats, freshwater marshes and related bodies of water are a dynamic, fragile link between oceanic and terrestrial ecosystems. Wetlands help improve the quality and quantity of water, as well as providing important wildlife habitats. By slowing run-off water, wetland vegetation causes silt to settle out, improving water quality. By retaining water during dry periods and holding it back during floods, wetlands will keep the water table high and relatively stable. By providing nesting, breeding and feeding grounds, wetlands support the diversity as well as health of wildlife. Several rare and/or endangered species are found within local coastal wetlands, including the California Brown Pelican and the California Least Tern.

The following policies related to protection of identified terrestrial habitats within the coastal zone:

**Policy 29:                    Protection of Terrestrial Habitats**

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

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

**Policy 30:                    Protection of Native Vegetation**

Native trees and plant cover shall be protected wherever possible. Native plants shall be used where vegetation is removed. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.176 OF THE CZLUO.]

**Policy 31:                    Design of Trails In and Adjoining Sensitive Habitats**

San Luis Obispo County, or the appropriate public agency, shall ensure that the design of trails in and adjoining sensitive habitat areas shall minimize adverse impact on these areas. [THIS POLICY SHALL BE IMPLEMENTED AS A STANDARD.]

**Policy 32:                    Public Acquisition**

The California Department of Parks and Recreation, Department of Fish and Game and other public and private organizations should continue to acquire or accept offers-to-dedicate for sensitive resource areas wherever possible. [THIS POLICY SHALL BE IMPLEMENTED AS A PROGRAM.]

**Policy 33:                    Agriculture and Open Space Preserves**

The county should encourage the uses of Agriculture Preserves or Open Space Preserves to protect sensitive habitat areas where public acquisition is not feasible. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT AS A PROGRAM.]

**Policy 34:                    Rare and Endangered Species Survey**

The State Department of Fish and Game should continue to identify rare or endangered plant and animal species within the county. [THIS POLICY SHALL BE IMPLEMENTED AS A PROGRAM.]

**Policy 35:                    Protection of Vegetation**

Vegetation which is rare or endangered or serves as cover for endangered wildlife shall be protected against any significant disruption of habitat value. All development shall be designed to disturb the minimum amount possible of wildlife or plant habitat. [THIS POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.176 OF THE CZLUO.]

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- c. Construction and landscaping activities shall be conducted to not degrade lakes, ponds, wetlands, or perennial watercourses within an SRA through filling, sedimentation, erosion, increased turbidity, or other contamination.
- d. Where an SRA is applied because of prominent geological features visible from off-site (such as rock outcrops), those features are to be protected and remain undisturbed by grading or development activities.
- e. Where an SRA is applied because of specified species of trees, plants or other vegetation, such species shall not be disturbed by construction activities or subsequent operation of the use, except where authorized by Development Plan approval.

### 23.07.170 - Environmentally Sensitive Habitats:

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

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

- (5) Verifies that applicable setbacks from the habitat area required by Sections 23.07.170 to 23.07.178 are adequate to protect the habitat or recommends greater, more appropriate setbacks.
  - (6) Critically evaluate “after-the-fact” permit applications where un-permitted development has illegally encroached into setback areas before off-site mitigation is considered. Evaluate all options of restoring and enhancing the pre-existing on-site habitat values. Off-site mitigation consisting of replacing the area of disturbance with like habitat at a minimum of 3:1 ratio shall be an additional requirement to offset the temporary impacts of the violation and address the potential for restoration efforts to fail.
- b. **Required findings:** Approval of a land use permit for a project within or adjacent to an Environmentally Sensitive Habitat shall not occur unless the applicable review body first finds that:
- (1) There will be no significant negative impact on the identified sensitive habitat and the proposed use will be consistent with the biological continuance of the habitat.
  - (2) The proposed use will not significantly disrupt the habitat.
- c. **Land divisions:** No division of a parcel containing an Environmentally Sensitive Habitat shall be permitted unless all proposed building sites are located entirely outside of the applicable minimum setback required by Sections 23.07.172 through 23.07.178. Such building sites shall be designated on the recorded subdivision map.
- d. **Alternatives analysis required.** Construction of new, improved, or expanded roads, bridges and other crossings will only be allowed within required setbacks after an alternatives analysis has been completed. The alternatives analysis shall examine at least two other feasible locations with the goal of locating the least environmentally damaging alternative. When the alternatives analysis concludes that a feasible and less environmentally damaging alternative does not exist, the bridge or road may be allowed in the proposed location when accompanied by all feasible mitigation measures to avoid and/or minimize adverse environmental effects. If however, the alternatives analysis concludes that a feasible and less-environmentally damaging alternative does exist, that alternative shall be used and any existing bridge or road within the setback shall be removed and the total area of disturbance restored to natural topography and vegetation.
- e. **Development standards for environmentally sensitive habitats.** All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. This standard requires that any project which has the potential to cause significant adverse impacts to an ESHA be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.
- (1) **Development within an ESHA.** In those cases where development within the ESHA cannot be avoided, the development shall be modified as necessary so that it is the least environmentally damaging feasible alternative. Development shall be consistent with the biological continuance of the habitat. Circumstances in which a development project would be allowable within an ESHA include:

- i. **Resource dependent uses.** New development within the habitat shall be limited to those uses that are dependent upon the resource.
  - ii. **Coastal accessways.** Public access easements and interpretive facilities such as nature trails which will improve public understanding of and support for protection of the resource.
  - iii. **Incidental public services and utilities in wetlands.** Essential incidental public services and utilities pursuant to ESHA Policy 13 and CZLUO Section 23.07.172(e).
  - iv. **Habitat creation and enhancement.** Where the project results in an unavoidable loss (i.e., temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant. Plans for the creation of new habitat, or the enhancement of existing habitat, shall consider the recommendations of the California Coastal Commission, the California Department of Fish and Game and/or U.S. Fish and Wildlife Service. Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ("same-kind") and within the same biome ("same-system"), and shall be permanently protected by a deed restriction or conservation easement.
  - v. **Restoration of damaged habitats.** Restoration or management measure required to protect the resource. Projects located within or adjacent to environmentally sensitive habitat areas that have been damaged shall be conditioned to require the restoration, monitoring, and long-term protection of such habitat areas through a restoration plan and a accompanying deed restriction or conservation easement. Where previously disturbed but restorable habitat for rare and sensitive plant and animal species exists on a site that is surrounded by other environmentally sensitive habitat areas, these areas shall be delineated and considered for restoration as recommended by a restoration plan.
- (2) **Development in ESHA to avoid a takings.** If development in an ESHA must be allowed to avoid an unconstitutional taking, then all of the following standards shall apply with respect to such development:
- i. **Avoidance of takings.** The amount and type of development allowed shall be the least necessary to avoid a takings.
  - ii. **Impacts avoided/minimized.** All development in and impacts to ESHA shall be avoided to the maximum extent feasible. Any unavoidable impacts shall be limited to the maximum extent feasible.
  - iii. **Mitigation required.** All adverse impacts to the ESHA shall be fully mitigated.
- (3) **Steelhead stream protection: net loss stream diversions prohibited.** Diversions of surface and subsurface water will not be allowed where a significant adverse impact on the steelhead run, either individually or cumulatively, would result.

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- e. **Alteration of riparian vegetation:** Cutting or alteration of natural riparian vegetation that functions as a portion of , or protects, a riparian habitat shall not be permitted except:
- (1) For streambed alterations allowed by subsections a and b above;
  - (2) Where an issue of public safety exists;
  - (3) Where expanding vegetation is encroaching on established agricultural uses;
  - (4) Minor public works projects, including but not limited to utility lines, pipelines, driveways and roads, where the Planning Director determines no feasible alternative exists;
  - (5) To increase agricultural acreage provided that such vegetation clearance will:
    - (i) Not impair the functional capacity of the habitat;
    - (ii) Not cause significant streambank erosion;
    - (iii) Not have a detrimental effect on water quality or quantity;
    - (iv) Be in accordance with applicable permits required by the Department of Fish and Game.
  - (6) To locate a principally permitted use on an existing lot of record where no feasible alternative exists and the findings of Section 23.07.174d(2) can be made.

[Amended 2004, Ord.2999]

**23.07.176 - Terrestrial Habitat Protection:**







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

- a. **Protection of vegetation.** Vegetation that is rare or endangered, or that serves as habitat for rare or endangered species shall be protected. Development shall be sited to minimize disruption of habitat.
- b. **Terrestrial habitat development standards:**
- (1) **Revegetation.** Native plants shall be used where vegetation is removed.
  - (2) **Area of disturbance.** The area to be disturbed by development shall be shown on a site plan. The area in which grading is to occur shall be defined on site by readily-identifiable barriers that will protect the surrounding native habitat areas.

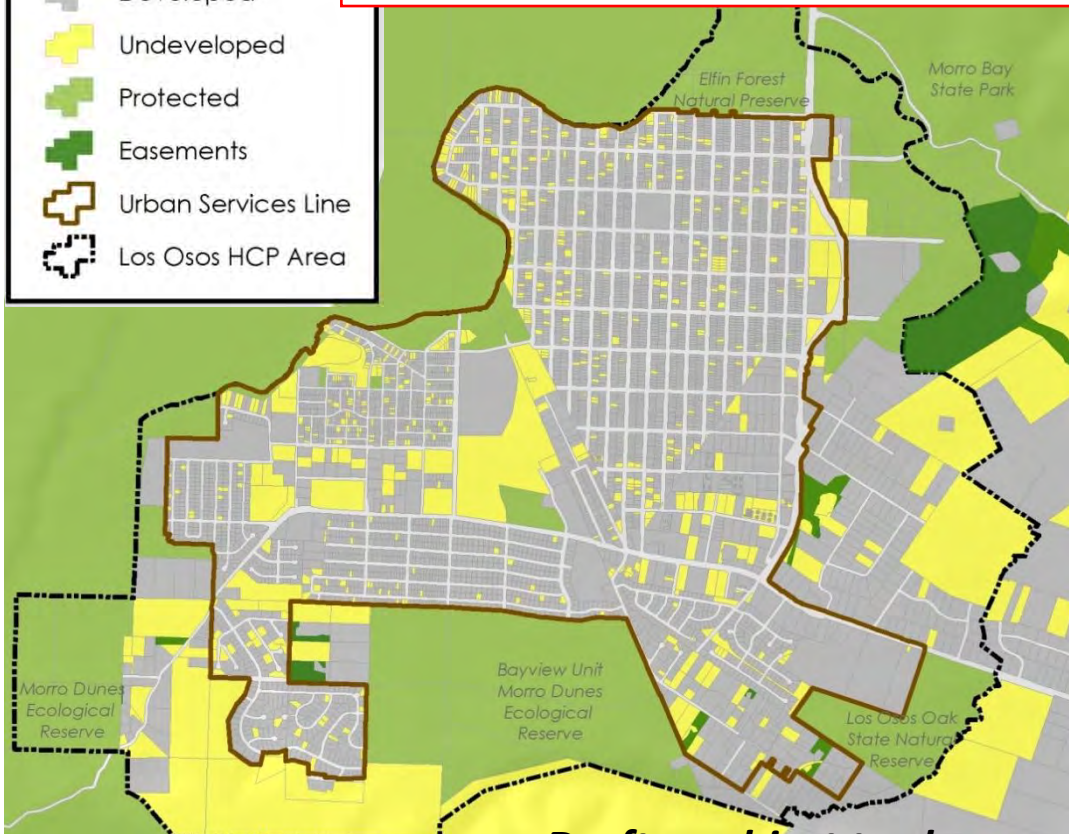


## LEGEND

### Parcel Status

-  Developed
-  Undeveloped
-  Protected
-  Easements
-  Urban Services Line
-  Los Osos HCP Area

# San Luis Obispo County Planning and Building Department, Los Osos Community-Wide HCP, CEQA/NEPA Public Scoping Meeting Presentation (Edited Text/Header)



**Currently-Vacant Parcels Within  
the Los Osos USL.**

***Draft – subject to change***

EXHIBIT 4B

A-3-SLO-11-055 & A-3-SLO-14-0021

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on the covered species (the conservation strategy). Covered activities included in the Habitat Conservation Plan are:

- Commercial and residential development and redevelopment on privately-owned parcels;
- Public entity and private utility company facility and infrastructure development projects;
- Public entity and private utility company activities to operate and maintain, including repair and replace, existing facilities; and
- Activities conducted to implement the Habitat Conservation Plan conservation strategy.

The purpose of issuing a programmatic incidental take permit is to allow the County to authorize the covered activities while conserving the covered species and their habitats. Implementation of a programmatic, multi-species Habitat Conservation Plan, rather than a species-by-species or project-by-project approach, will maximize the benefits of conservation measures for covered species and eliminate potentially expensive and time-consuming efforts associated with processing individual incidental take permits for each project within the proposed Habitat Conservation Plan area. It is important to note that completion of the Los Osos wastewater treatment plant, rather than adoption of the Habitat Conservation Plan and issuance of the incidental take permit(s) to the County, is the action that will trigger lifting of the moratorium and allow new or expanded development to proceed subject to receipt of the required permits. Adoption of the Habitat Conservation Plan and issuance of the incidental take permit(s) would facilitate a streamlined permitting process and also provide a cohesive conservation strategy managed by one entity with a single funding source, but is not a requirement for activities covered in the Habitat Conservation Plan to proceed.

### **Project Location**

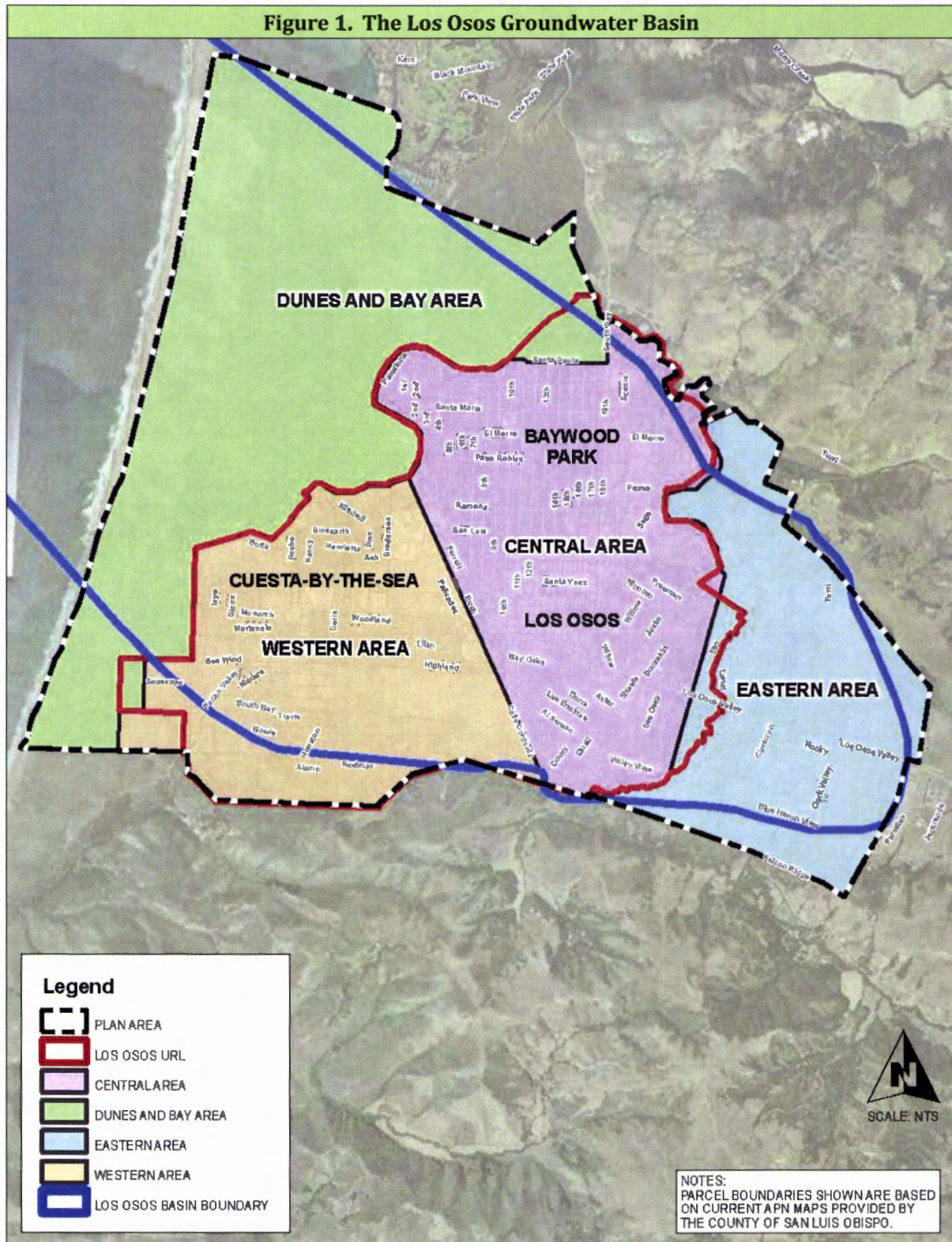
The study area for the Draft EIR/NEPA document will be the unincorporated community of Los Osos, which is located on the central coast of California in San Luis Obispo County, approximately ten miles west of San Luis Obispo and five miles south of Morro Bay (see Figure 1). The study area borders the Morro Bay Estuary to the west, Morro Bay State Park to the north, Los Osos Creek to the east, and Montana de Oro State Park to the south. The study area coincides with the Urban Reserve Line for Los Osos.

### **Los Osos Sewer/RWQCB Prohibition Area**

In 1983, the RWQCB adopted a Discharge Prohibition Area for large portions of the Los Osos/Baywood Park community to reduce water quality pollution in the Los Osos area. This Prohibition Area has severely limited the County from issuing permits for new sources of sewage discharge or increases in the volume from existing sources. Subsequently, the County Board of Supervisors identified Los Osos as having a 'Level of Severity III' for inadequate sewage capacity, further restricting new development.

The solution to reduce this water quality problem was the construction of a public sewer system, which is now currently underway outside of Los Osos on Turri Road. **Once operational, the wastewater treatment facility will provide service to 5,147 parcels within the 1,584-acre wastewater service area, including lots that are currently vacant (approximately 577 lots) (see Figure 2).** As the Prohibition Area did not cover the entire community, there are 866 parcels located outside of the sewer service area that will continue to utilize septic systems for on-site sewage treatment and disposal.

Figure 1. The Los Osos Groundwater Basin



**REASON FOR APPEAL: SAN LUIS OBISPO COUNTY COASTAL DEVELOPMENT PERMIT  
APPLICATION D010041P 7 (TRACKS REALTY TRUST)**

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San Luis Obispo County approved a CDP to construct a two-story 5,000 square-foot single-family residence on an approximately 0.45-acre parcel located at 286 San Leandro Court, which is in the Cabrillo Estates neighborhood of the community of Los Osos in San Luis Obispo County. The County-approved project raises Local Coastal Program (LCP) conformance issues and questions as follows:

The approved project is located on an approximately ½-acre undeveloped site that the County found to be all protected Terrestrial Habitat and environmentally sensitive habitat area (ESHA) under the LCP for the federally endangered Morro shoulderband snail (*Helminthoglypta walkeriana*). The project site is connected, to the east, to a 5-acre undeveloped site, which is also habitat for the Morro shoulderband snail, and is also an integrated complex habitat of coastal dune scrub, maritime chaparral, and oak woodland, and also includes federally threatened Morro manazita. This adjacent site is the subject of an appeal currently pending before the Commission, where the Commission previously took jurisdiction over a CDP application for an approximately 12,000 square-foot single-family residence, finding that this adjacent 5-acre site is also all ESHA.

The LCP requires preservation and protection of ESHA, and emphasizes protection of the entire ecological community. These LCP policies include the following: Coastal Plan Policies 1, 2, 29, 30, and 35 and Coastal Zone Land Use Ordinance (CZLUO) § 23.07.170 and § 23.07.176. When a project site is determined to constitute Terrestrial Habitat ESHA, as the County did in this case, use and development in such areas is limited to uses associated, or dependent, on the resource, and only if such use and development does not result in significant disruption to ESHA. When the application of this and related LCP policies will lead to a unconstitutional taking of private property, the LCP provides a process for allowing certain limited development to avoid a taking. In those rare instances, the taking avoidance standards would then require that the development meet the following: (i) the amount and type of development must be the least necessary to avoid a taking; (ii) all development in and impacts to ESHA must be avoided to the maximum extent feasible, and any unavoidable impacts shall be limited to the maximum extent feasible; and (iii) all adverse impacts to the ESHA must be fully mitigated. [§ 23.07.170(e)(2)].

In this case, however, the County did not address this project through the LCP-required taking avoidance exception. Rather, the County found that the project was consistent with the applicable policies because the project includes mitigation for the loss of 1.68-acres of snail habitat, which the County described as the aggregate impact of both the project at issue here and for the development on the adjacent 5-acre parcel that is currently pending before the Commission. The County required a 3.82-acre conservation easement, which includes the enhancement of 0.24-acre of degraded coastal scrub habitat, with all of the mitigation on the 5-acre parcel. This raises a series of issues worthy of Commission consideration, including with respect to allowing non-resource dependent development in ESHA absent a takings evaluation, and, were the LCP-required takings analysis to have been performed, the degree to which the proposed project can be found to meet the required LCP tests. In addition, the way in which the project was co-mingled with the project currently pending before the Commission raises

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concerns related to both the requisite takings evaluation as well as the degree to which it could compromise and/or prejudice the Commission's ability to make a decision on the prior appealed project.

In sum, the County-approved project would result in a loss of ESHA where it is not clear that this is allowed under the LCP because the County did not evaluate the project in the way required by the LCP for an all-ESHA parcel and a takings. In addition, the way in which the County approved the project, tying it to the adjacent property where an appeal of a larger residence is pending before the Commission, raises concerns because it affects the Commission's analysis of the project on appeal, including in light of takings. These issues warrant Commission consideration.

**CALIFORNIA COASTAL COMMISSION**

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

**ADOPTED****F11a**

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

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

## **APPEAL STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY**

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

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

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

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

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

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

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

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

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

### **A. Staff Recommendation**

#### **1. Summary of Staff Recommendation**

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

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



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

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

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

## **2. Staff Recommendation on Substantial Issue**

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

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

**Staff Recommendation of Substantial Issue.** Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.



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

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## B. Findings and Declarations

The Commission finds and declares as follows:

### 1. Project Location

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

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



## **2. Project Description**

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

See Exhibit B for project site plans.

## **3. San Luis Obispo County CDP Approval**

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

## **4. Appeal Procedures**

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

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

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



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

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

## 5. Summary of Appeal Contentions

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

Please see Exhibit C for the complete appeal document.

## 6. Substantial Issue Determination

### A. Applicable LCP Policies

LCP Section 23.11.030 defines ESHA as follows:

***Environmentally Sensitive Habitat Area (Mapped ESHA).** A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats and are mapped as Land Use Element combining designations. Is the same as an Environmentally Sensitive Habitat.*

***Environmentally Sensitive Habitat Area (Unmapped ESHA).** A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development. They include, but are not limited to, known wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats that may not be mapped as*

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



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

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

LCP ESHA land use policies applicable to ESHA include:

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

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

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

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

***ESHA Policy 30: Protection of Native Vegetation.*** *Native trees and plant cover shall be protected wherever possible. Native plants shall be used where vegetation is removed. [THIS*



*POLICY SHALL BE IMPLEMENTED PURSUANT TO SECTION 23.07.176 OF THE CZLUO.]*

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

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

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

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



*23.07.178 are adequate to protect the habitat or recommends greater, more appropriate setbacks.*

- (6) Critically evaluate "after-the-fact" permit applications where un-permitted development has illegally encroached into setback areas before off-site mitigation is considered. Evaluate all options of restoring and enhancing the pre-existing on-site habitat values. Off-site mitigation consisting of replacing the area of disturbance with like habitat at a minimum of 3:1 ratio shall be an additional requirement to offset the temporary impacts of the violation and address the potential for restoration efforts to fail.*
- b. Required findings:** *Approval of a land use permit for a project within or adjacent to an Environmentally Sensitive Habitat shall not occur unless the applicable review body first finds that:*
- (1) There will be no significant negative impact on the identified sensitive habitat and the proposed use will be consistent with the biological continuance of the habitat.*
- (2) The proposed use will not significantly disrupt the habitat.*
- c. Land divisions:** *No division of a parcel containing an Environmentally Sensitive Habitat shall be permitted unless all proposed building sites are located entirely outside of the applicable minimum setback required by Sections 23.07.172 through 23.07.178. Such building sites shall be designated on the recorded subdivision map.*
- d. Alternatives analysis required.** *Construction of new, improved, or expanded roads, bridges and other crossings will only be allowed within required setbacks after an alternatives analysis has been completed. The alternatives analysis shall examine at least two other feasible locations with the goal of locating the least environmentally damaging alternative. When the alternatives analysis concludes that a feasible and less environmentally damaging alternative does not exist, the bridge or road may be allowed in the proposed location when accompanied by all feasible mitigation measures to avoid and/or minimize adverse environmental effects. If however, the alternatives analysis concludes that a feasible and less environmentally damaging alternative does exist, that alternative shall be used and any existing bridge or road within the setback shall be removed and the total area of disturbance restored to natural topography and vegetation.*
- e. Development standards for environmentally sensitive habitats.** *All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. This standard requires that any project which has the potential to cause significant adverse impacts to an ESHA be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.*
- (1) Development within an ESHA.** *In those cases where development within the ESHA cannot be avoided, the development shall be modified as necessary so that it is the least*



*environmentally damaging feasible alternative. Development shall be consistent with the biological continuance of the habitat. Circumstances in which a development project would be allowable within an ESHA include:*

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



*avoided to the maximum extent feasible. Any unavoidable impacts shall be limited to the maximum extent feasible.*

*iii. Mitigation required. All adverse impacts to the ESHA shall be fully mitigated.*

...

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

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

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

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

**b. Terrestrial habitat development standards:**

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

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

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

## **B. Analysis**

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

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



review.<sup>2</sup>

The LCP requires the preservation and protection of TH ESHA, and emphasizes protection of the entire ecological community over individual plants and/or animals (CZLUO Section 23.07.176). When TH ESHA is determined, as the County did in this case, use and development in such areas is limited to only that associated with those uses that are dependent on the ESHA resource, and only where such use and development does not result in significant disruption to ESHA (per ESHA Policies 1, 2, 29, and 30). When application of this and related LCP policies will lead to a taking of private property, the LCP provides a process for allowing certain limited development as a means to avoid such a taking. In such extraordinary circumstances, only the least amount of development necessary to avoid such a taking, including in terms of avoiding impacts to the maximum extent feasible, is allowed, and all adverse impacts to the ESHA must be fully mitigated (per CZLUO Section 23.07.170).

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

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

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

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



this.

In short, such development does not appear to be the least amount necessary to avoid a taking (if one is indeed present), and does not appear to avoid ESHA impacts to the maximum extent feasible, as required by the LCP. As described, a comprehensive alternatives analysis that focuses on appropriate types of uses for an all-ESHA site, as well as alternative design measures that could be used in a residential project to avoid ESHA impacts, is missing from the County approval. And although the County's approval requires the remainder of the site to be preserved through easements (3.82 acres of conservation easement for Morro shoulderband snail and 0.45 acres of open space easement for oak and Manzanita plantings), the offsetting mitigation applied (i.e., enhancement of about one-quarter acre of coastal dune scrub onsite, four years of monitoring and maintenance of such enhancement area, and replanting of oaks and manzanitas at 4 and 5 to 1 ratios respectively to facilitate residential development) is less than a 1:1 area ratio in relation to the three-quarter acre development envelope, does not create new offsetting ESHA area, and overall does not sufficiently and proportionately offset the adverse impacts to ESHA from the County-approved project.

### **C. Substantial Issue Determination Conclusion**

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

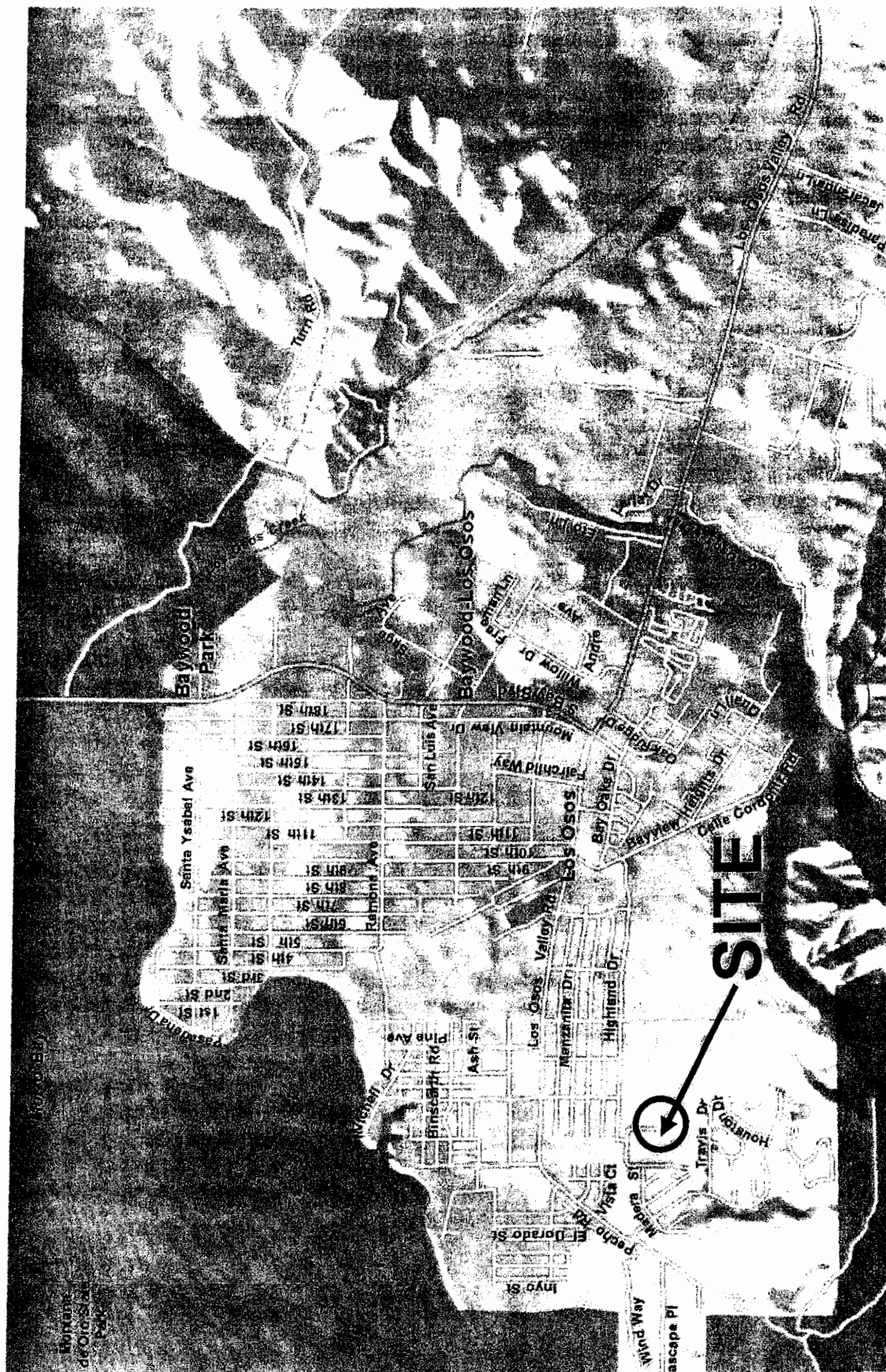
In short, the County's action provides for a large scale residential project in a significant ESHA area that includes sensitive species habitat without adequate factual and legal support to justify approval of the project under the LCP. In addition, the action taken is the first in this area to be taken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

Prior to bringing this matter back for Coastal Commission review in a de novo CDP hearing context, the Applicant will need to provide information related to a potential taking, including with respect to the economic impact of applying the LCP's ESHA policies at this site to this project and the nature of the



Applicant's property interest in a takings context. In addition, the Applicant must provide an alternatives analysis assessing whether there are alternative project projects and/or project designs that would avoid ESHA impacts to the maximum extent feasible. Absent such information and a determination that application of the LCP's ESHA policies will result in a taking, the proposed project is inconsistent with the LCP's ESHA policies, as described above.



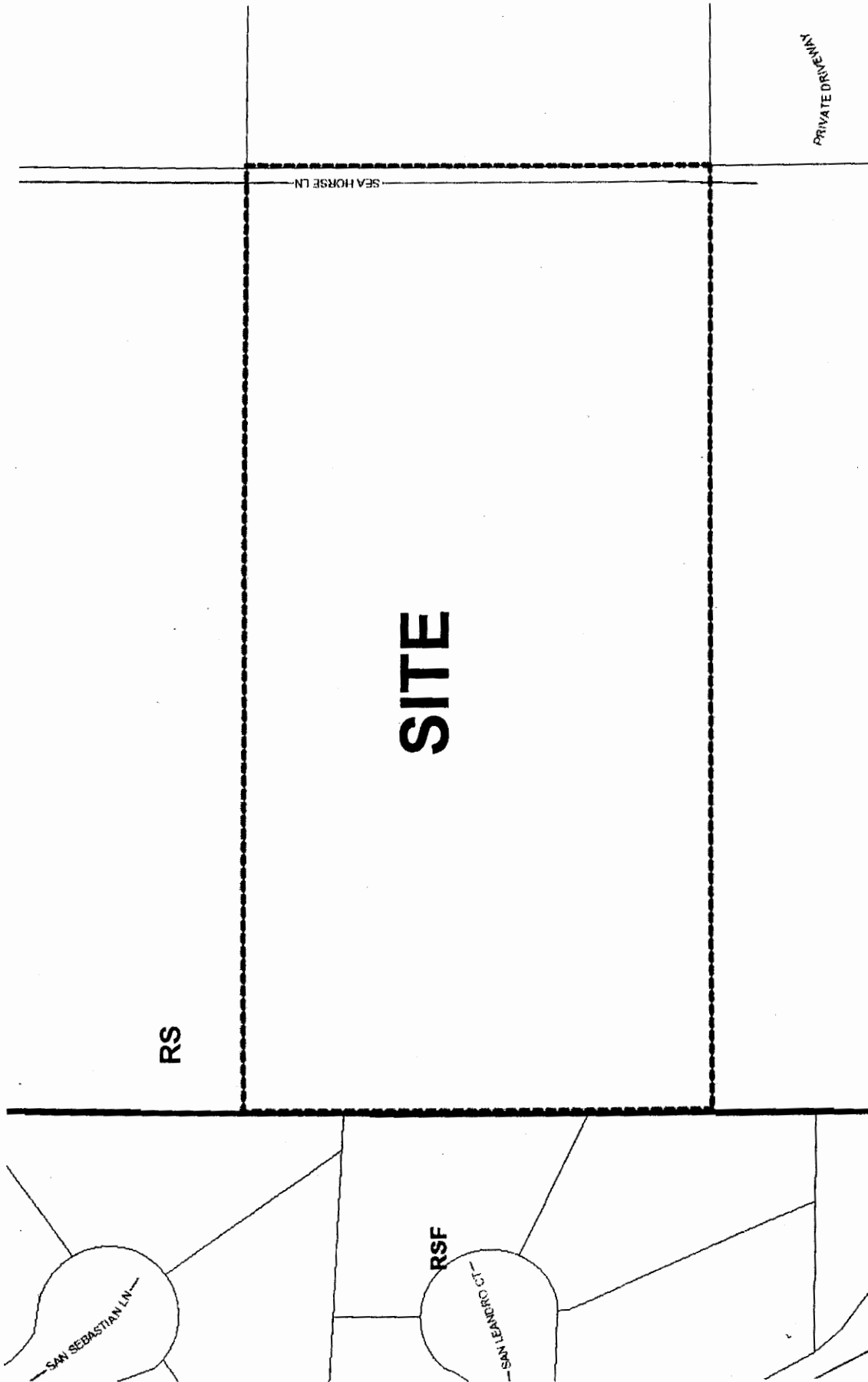


EXHIBIT

Vicinity Map



PROJECT  
Minor Use Permit  
D990336P / Kellaway



EXHIBIT

Land Use Map



PROJECT

Minor Use Permit  
D990336P / Kellaway

CCC Exhibit A

(page 2 of 7 pages)

A-3-SLO-14-0021

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SITE

EXHIBIT

Aerial

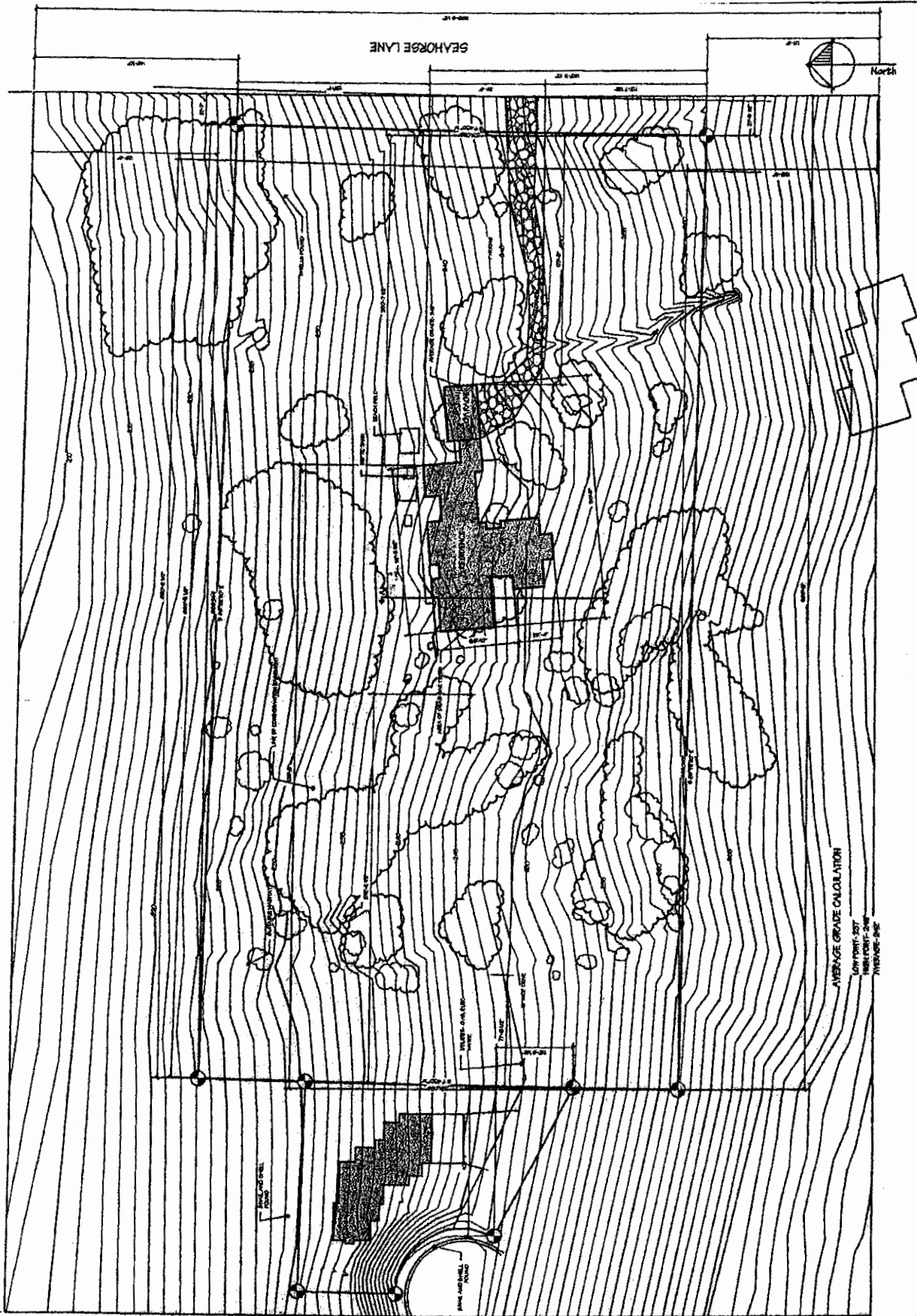


PROJECT

Minor Use Permit  
D990336P / Kellaway

CCC Exhibit A Exhibit 6  
(page 3 of 7 pages)

A-3-SLO-14-0021



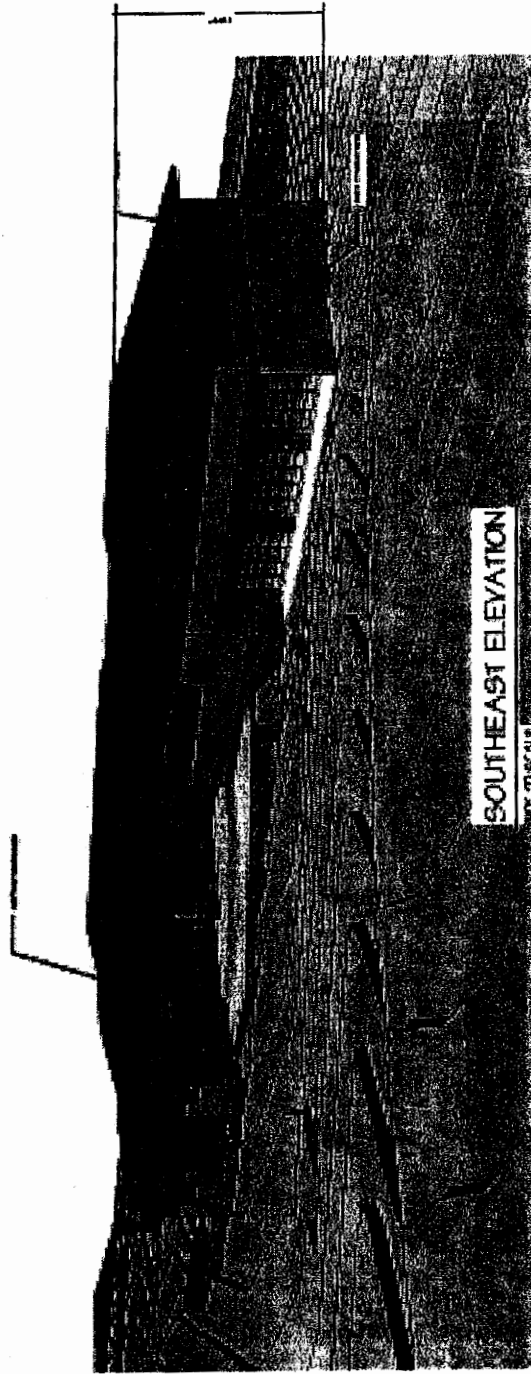
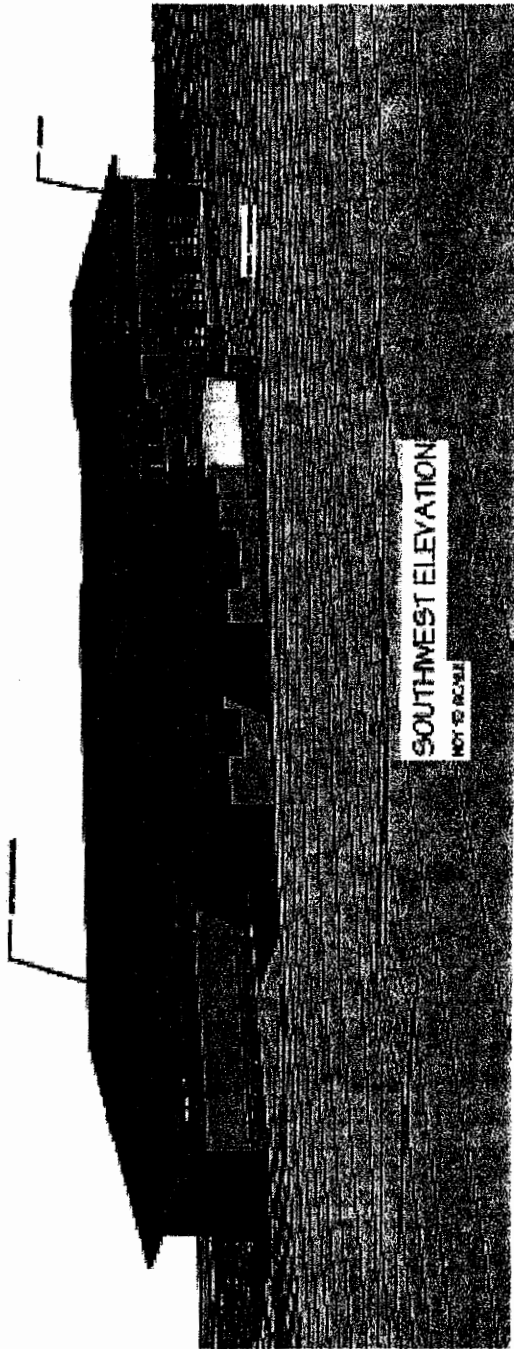
EXHIBIT

Site Plan



PROJECT

Minor Use Permit  
D990336P / Kellaway



CCC Exhibit A  
(page 6 of 7 pages)

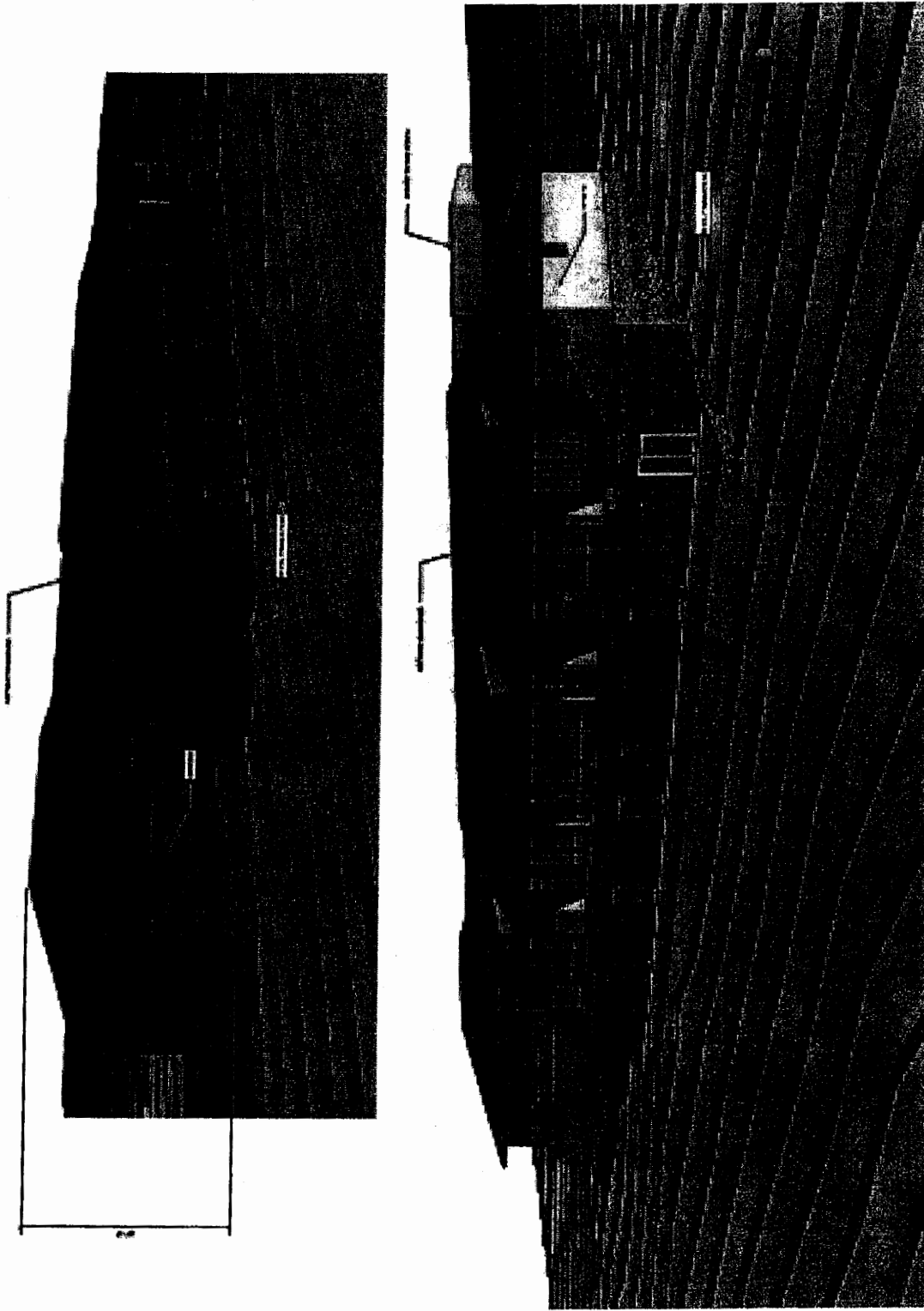
PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

Elevations





NOT

CCC Exhibit A  
(page 7 of 7 pages)

Exhibit C  
A-3-SLO-11-055  
A-3-SLO-14-0021  
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PROJECT

Minor Use Permit  
D990336P / Kellaway

EXHIBIT

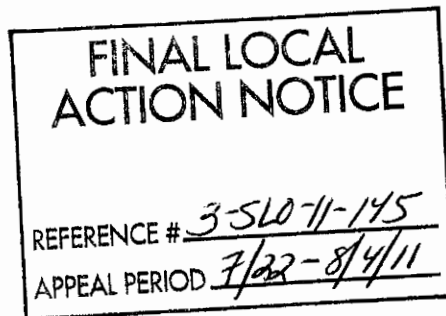
Elevations







SAN LUIS OBISPO COUNTY  
DEPARTMENT OF PLANNING AND BUILDING



July 5, 2011

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

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

**RECEIVED**

JUL 21 2011

California Coastal Commission,  
Central Coast Area

**NOTICE OF FINAL COUNTY ACTION**

HEARING DATE: July 1, 2011

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

LOCATED WITHIN COASTAL ZONE: YES

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

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

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

**CCC Exhibit B**  
A-3, SLO-11-055  
(page 2 of 14 pages)

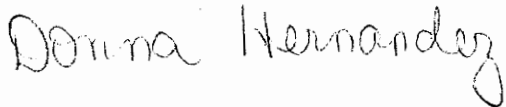
Coastal Commission Office. Contact the Commission's Santa Cruz Office at (831) 427-4863 for further information on their appeal procedures.

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

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

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

Sincerely,



DONNA HERNANDEZ, SECRETARY PRO TEM  
PLANNING DEPARTMENT HEARINGS

## EXHIBIT A - FINDINGS

### *Environmental Determination*

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

### *Minor Use Permit*

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

### *Coastal Access*

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

### *Water Resources*

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

## EXHIBIT B - CONDITIONS OF APPROVAL

### Approved Development

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

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

#### **Site Development**

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

#### **Fire Safety**

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

#### **Services**

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

### **Public Works**

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

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

#### **Fees**

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

### **Air Quality**

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

### **Biological Resources**

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

### **Geology and Soils**

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

### **Water Resources**

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

### **Drainage**

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

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

#### **Site Development**

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

#### **Fire Safety**

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

#### **Development Review Inspection**

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

#### **Aesthetics**

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

### **Biological Resources**

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

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

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

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

**Miscellaneous**

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

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



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

Promoting the wise use of land  
Helping build great communities

Tentative Notice of Action

MEETING DATE July 1 2011	CONTACT/PHONE Kerry Brown, Project Manager 781-5713	APPLICANT Tom Kellaway	FILE NO. D990336P
LOCAL EFFECTIVE DATE July 15, 2011	APPROX FINAL EFFECTIVE August 5, 2011		
SUBJECT A request by Tom Kellaway for a Minor Use Permit / Coastal Development Permit to allow a new two story 11,412 square-foot single family residence with attached 968 square-foot garage. The project will result in the disturbance of approximately 11,320 square feet on a 5-acre parcel. The proposed project is within the Residential Suburban land use category and is located on Sea Horse Lane, approximately 1075 feet south of Highland Drive, in the community of Los Osos. The site is in the Estero planning area.			
RECOMMENDED ACTION 1. Adopt the Mitigated Negative Declaration in accordance with the applicable provisions of the California Environmental Quality Act, Public Resources Code Section 21000 et seq. 2. Approve Minor Use Permit / Coastal Development Permit D990336P based on the findings listed in Exhibit A and the conditions listed in Exhibit B.			
ENVIRONMENTAL DETERMINATION The Environmental Coordinator, after completion of the initial study, finds that there is no substantial evidence that the project may have a significant effect on the environment, and the preparation of an Environmental Impact Report is not necessary. Therefore, a Mitigated Negative Declaration (pursuant to Public Resources Code Section 21000 et seq. and CA Code of Regulations Section 15000 et seq.) has been issued on May 26, 2011 for this project. Mitigation measures are proposed to address aesthetics, biological resources, air quality, geology /soils, public services, transportation/ circulation, water resources and are included as conditions of approval.			
LAND USE CATEGORY Residential Suburban	COMBINING DESIGNATION Local Coastal Plan, Coastal Appealable Zone	ASSESSOR PARCEL NUMBER 074-022-042	SUPERVISOR DISTRICT(S) 2
PLANNING AREA STANDARDS: Septic Tank requirements and Drainage  <i>Does the project meet applicable Planning Area Standards: Yes - see discussion</i>			
LAND USE ORDINANCE STANDARDS: Setbacks  <i>Does the project conform to the Land Use Ordinance Standards: Yes - see discussion</i>			
FINAL ACTION This tentative decision will become the final action on the project, unless the tentative decision is changed as a result of information obtained at the administrative hearing or is appealed to the County Board of Supervisors pursuant Section 23.01.042 of the Coastal Zone Land Use Ordinance; effective on the 10th working day after the receipt of the final action by the California Coastal Commission. The tentative decision will be transferred to the Coastal Commission following the required 14 calendar day local appeal period after the administrative hearing.  The applicant is encouraged to call the Central Coast District Office of the Coastal Commission in Santa Cruz at (831) 427-4863 to verify the date of final action. The County will not issue any construction permits prior to the end of the Coastal Commission process.			

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

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

## DISCUSSION

### PLANNING AREA STANDARDS:

Estero Area Plan; Los Osos Urban Area

#### On-Site Wastewater Disposal

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

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

#### Drainage

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

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

Residential Suburban Standards:  
Highland Area

#### Site Selection

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

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

Slopes exceeding 20%

No development shall occur on slopes exceeding 20%.

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

#### Building Exteriors

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

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

#### LAND USE ORDINANCE STANDARDS

##### *Section 23.01.043 – Appeals to the Coastal Commission (Coastal Appealable Zone)*

The project is appealable to the Coastal Commission because the project is proposed development between the ocean and first public road (Los Osos Valley Road).

##### *Section 23.04.100-112 Setbacks*

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

*The project complies with the required setbacks.*

##### *Section 23.07.170 Environmentally Sensitive Habitats*

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

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

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

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

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

#### COASTAL PLAN POLICIES

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

#### Public Works:

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

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

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

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

#### Coastal Watersheds:

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

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

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

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

**Policy 8: Timing of new construction:**

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

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

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

**ENVIRONMENTAL DETERMINATION:**

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

**COMMUNITY ADVISORY GROUP COMMENTS:**

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

**CCC Exhibit B**  
**(page 12 of 14 pages)**

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

**AGENCY REVIEW:**

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

**LEGAL LOT STATUS:**

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

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

**CALIFORNIA COASTAL COMMISSION**

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

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

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

**SECTION I. Appellant(s)**

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

Mailing Address: 45 Fremont Street, Suite 2000

City: San Francisco, CA

Zip Code: 94105

Phone: (415) 904-5200

**SECTION II. Decision Being Appealed**

1. Name of local/port government:

San Luis Obispo County

2. Brief description of development being appealed:

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

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

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

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

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

**RECEIVED**

AUG 03 2011

California Coastal Commission,  
Central Coast Area

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

**TO BE COMPLETED BY COMMISSION:**

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

DATE FILED: August 4, 2011

DISTRICT: Central Coast

**CCC Exhibit** C  
Exhibit 6  
(page 1 of 5 pages)

A-3-SLO-14-0021

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

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

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

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

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

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

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

a. Name and mailing address of permit applicant:

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

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

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

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

(3)

(4)

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

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

SECTION V. Certification

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

Signed: Mohw. Str  
Appellant or Agent

Date: August 3, 2011

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

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

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

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

**SECTION V. Certification**

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



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

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

8/2/11

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

**Section VI. Agent Authorization**

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

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

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

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

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

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

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

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

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

**CALIFORNIA COASTAL COMMISSION**

SOUTH CENTRAL COAST AREA  
89 SOUTH CALIFORNIA ST., SUITE 200  
VENTURA, CA 93001  
(805) 585-1800

**M E M O R A N D U M**

FROM: Jonna D. Engel, Ph.D., Ecologist

TO: Adrian Kamada, Coastal Analyst

SUBJECT: Kellaway Site, Los Osos, California: ESHA Determination for the Eastern and Western Parcels

DATE: May 28, 2014

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**Documents Reviewed:**

Holland, V.L. May 2000. Botanical Survey; Kellaway Property Lot 25 San Leandro and Adjacent 5 Acre Parcel (#42), Los Osos, California. Prepared for Bob Semonsen, 1120 4<sup>th</sup> St., Los Osos, CA 93402.

SWCA Environmental Consultants. June 24, 2010. Low-Effect Habitat Conservation Plan for the federally endangered Morro shoulderband snail on the Kellaway Property, Los Osos, California. Prepared for Thomas Kellaway, 12230 State Line, Leawood, Kansas.

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I have been asked to review the biological resources on two undeveloped parcels located between Seahorse Lane and San Leandro Court in the southwestern portion of the community of Los Osos, San Luis Obispo County, California to determine whether the parcels support environmentally sensitive habitat (ESHA). The eastern parcel occupies 5.08 acres, and the western parcel occupies 0.45 acres. In order to make my determination I visited the site in spring 2010 and fall 2012, I reviewed the documents listed above, studied historic and current aerial photographs, and consulted with a California central coast United States Fish and Wildlife Service (USFWS) biologist.

The eastern 5.08 acre parcel is covered by a dense and pristine mosaic of coastal dune scrub, maritime (coastal dune) chaparral, and coast live (pygmy) oak woodland. Central coast dune scrub is a rare habitat type with a rarity ranking of G2, S2.2<sup>1</sup> and an

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<sup>1</sup> California Natural Diversity Database (CNDDB) Element Global and State Ranking. G2 and S2: Imperiled, at high risk of extinction due to very restricted range, very few populations, steep declines, or other factors.

estimated 6-20 element occurrences (EOs) or 2000-10000 acres. The maritime chaparral on the parcel is identified as *Arctostaphylos morroensis* (Morro manzanita chaparral) Shrubland Alliance in the "Manual of California Vegetation" (MCV2)<sup>2</sup>. The rarity ranking for this plant community is G1 S1<sup>3</sup> with less than 6 EO's or 2000 acres estimated to be in existence. Pygmy oak woodland is limited to California's central coast and consists of coast live oak (*Quercus agrifolia*) that does not exceed 10 feet in height. The oak woodland on this parcel is composed of a race of coast live oak locally referred to as the pygmy oak and sometimes given the varietal status *Quercus agrifolia* var. *frutescens*. These oaks often grow as gnarled shrubs or small trees with branches bent to the ground and covered in lichens.

In addition to the rare plant communities the parcel also supports several rare plant species indicative of these habitats including the morro manzanita which is listed as federally threatened, is a state candidate species, and is listed by the California Native Plant Society (CNPS) as 1B.1<sup>4</sup>; suffrutescent wallflower, *Erysimum insulare* ssp *suffrutescens* listed by CNPS as 4.2<sup>5</sup>; California spineflower, *Mucronea californica* listed by CNPS as 4.2<sup>6</sup>; and dune almond, *Prunus fasciculata* var. *punctata* listed by CNPS as 4.3<sup>7</sup>. Morro manzanita is endemic to San Luis Obispo County and is restricted to the sandy soils in the Los Osos area; it was much more widespread prior to development of the Los Osos area.

The parcel also likely supports the federally endangered Morro shoulderbanded (=banded dune) snail (*Helminthoglypta walkeriana*) whose habitat includes coastal dune scrub, maritime chaparral, and grasslands. While a 2002 habitat assessment for MSS on this parcel found MSS shells but no live snails, it concluded that the parcel provides good habitat value for MSS due to the dense cover and connectivity with adjacent larger areas of undisturbed habitat<sup>8</sup>.

The San Luis Obispo County LCP states the following regarding ESHA:

*A. Sensitive Habitats*

*Environmentally sensitive habitat areas are settings in which plant or animal life (or their habitats) are rare or especially valuable due to their special role in an ecosystem. Designation of environmentally sensitive habitats include but are not*

<sup>2</sup> Sawyer, J.O., T. Keeler-Wolf and J.M. Evens. 2009. A manual of California Vegetation. Second Edition. California Native Plant Society Press. Sacramento, CA. 1300 pgs.

<sup>3</sup> California Natural Diversity Database (CNDDB) Element Global and State Ranking. G1 and S1: Critically Imperiled, at very high risk of extinction due to extreme rarity.

<sup>4</sup> CNPS Rankings. 1B: Plants rare, threatened or endangered in California or elsewhere. 1B.1: Seriously threatened in California.

<sup>5</sup> CNPS Rankings. 4: Plants of limited distribution – a watch list. 4.2: Moderately threatened in California.

<sup>6</sup> Ibid

<sup>7</sup> CNPS Rankings. 4: Plants of limited distribution – a watch list. 4.3: Not very threatened in California.

<sup>8</sup> Morro Group Inc. January 21, 2002. Morro Shoulderband Snail Habitat Assessment Report. Prepared for Mr. Bob Semonsen.

*limited to: 1) wetlands and marshes; 2) coastal streams and adjacent riparian areas; 3) habitats containing or supporting rare and endangered or threatened species; 4) marine habitats containing breeding and/or nesting sites and coastal areas used by migratory and permanent birds for resting and feeding. The Coastal Act provides protection for these areas and permits only resource-dependent uses within the habitat area. Development adjacent must be sited to avoid impacts.*

The 5.08 acre eastern parcel supports rare habitats, rare plant species, and likely supports the federally endangered Morro shoulderbanded snail (MSS). These habitats and species are easily disturbed by human development and activities. Therefore I find that the biological resources on the entire eastern parcel rise to the level of ESHA.

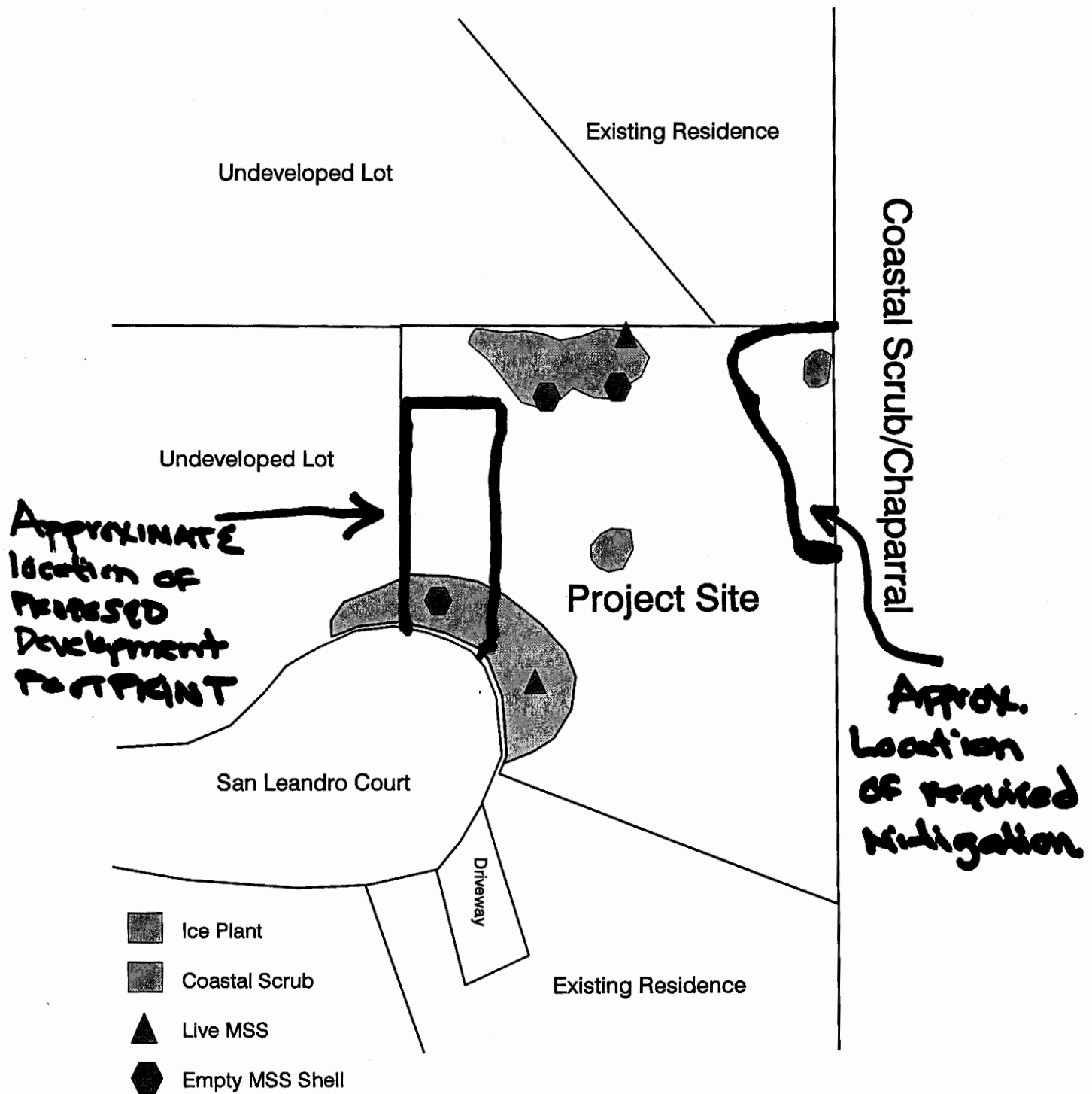
The western parcel occupies 0.45 acre along a cul de sac within a San Luis Obispo County subdivision created in the 1980's. The parcel was subject to significant grading to create step down parcels that eliminated all natural resources. The parcel is currently dominated by veldt grass (*Ehrharta calycina*) that is regularly mowed. Veldt grass is a non-native invasive species (originally from Africa) that once established tends to inhibit the recolonization of native species. The parcel supports a few small patches (approximately 25 sq. ft. each) of scrub species including coastal buckwheat (*Eriogonum parvifolium*), coastal silver lupine (*Lupinus chamissonis*), and buckbrush (*Ceanothus cuneatus*), which are members of coastal dune scrub and maritime chaparral communities. There is a small slope on the south portion of the parcel that is comprised of almost 100% ice plant. During a 2002 Morro shoulderband snail assessment survey no live snails or shells were found on the parcel<sup>9</sup>. In 2004/2005 MSS protocol surveys, two live MSS and three empty MSS shells were found on the parcel<sup>10</sup>. One live MSS was found within the iceplant on the south side of the parcel adjacent to the cul de sac. The other live MSS was found on the north side of the parcel within a coastal scrub patch near the 5.08 acre eastern parcel.

Julie Vanderwier, USFWS Senior Biologist, who has worked on the Morro shoulderband snail in Los Osos for over 10 years and participated in development of the HCP for the two subject parcels, stated that the 0.45 acre parcel does not support significant native habitat and has no long term conservation value for MSS (pers. comm. May 29, 2014). Although two MSS were identified on the western parcel in 2004/2005, I find that the majority of the biological resources it supports do not rise to the level of ESHA because the parcel is a disturbed and degraded area dominated by non-native and invasive veldt grass that is surrounded on three sides by development. In addition, the few patches of native scrub on the parcel are very small and fragmented. The only habitat on the parcel that I find rises to the level of ESHA is the coastal scrub habitat that is contiguous with the pristine habitat on the adjacent eastern parcel. Given that the western parcel is

<sup>9</sup> Ibid.

<sup>10</sup> Morro Group Inc. January 26, 2005. Morro Shoulderband Snail Protocol Survey Report for 286 San Leandro Court, Los Osos, California. Prepared for Bob Semonsen.

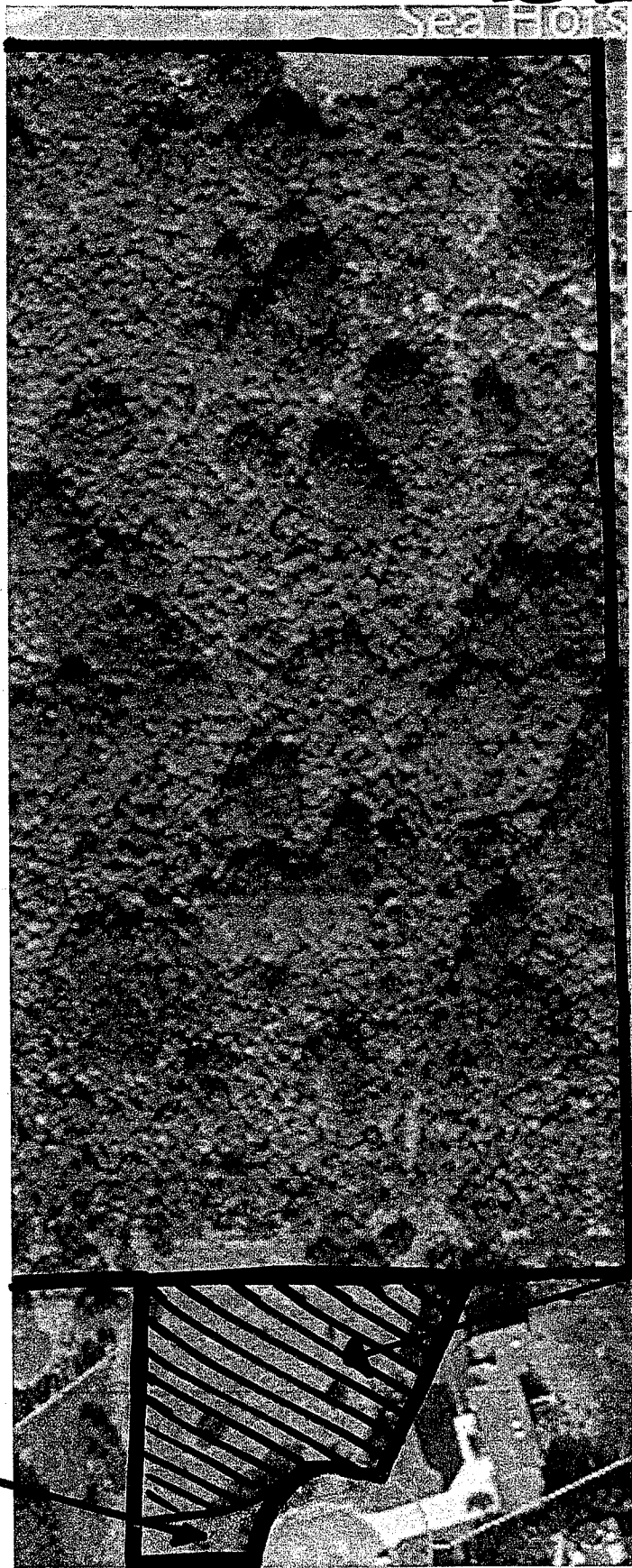
immediately adjacent to the pristine habitat supported on the eastern parcel I recommend that a 100 foot buffer be applied between this habitat and any development approved on the western parcel. This buffer recommendation also applies to the native coastal scrub habitat on the western parcel that is contiguous with the pristine habitat on the eastern parcel.



Sea Horse Lane

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EXHIBIT 9

Approximate area  
outside 100-foot buffer



Approximate area  
within 100-foot buffer

San Leandro Court

N  
W - E  
S

On-site ESHA

25' Front Setback; 20' Rear; 5' Side

100' ESHA Buffer from San Leandro Ct Northeast On-site Esha

SEA HORSE LANE PARCEL 100% ESHA

100' ESHA Buffer from ESHA located on Sea Horse Lane Parcel

Adjacent ESHA

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Exhibit 9  
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