W7e

Before the California Coastal Commission
December 9, 2015 Meeting
Agenda Item No. W7e

On Petition to Rescind Potential Taking/Taking Avoidance Criteria

Petitioner's Reply to CCC Staff Addendum

The Addendum misrepresents the Petitioner's argument in many respects. Simply stated, it is the job of the Coastal Commission to make and enforce rules and decide whether or not to grant permits in accordance with county LCPs that it has certified. If it appears that the permit must be denied because it conflicts with the LCP, the applicant may seek a variance or other form of waiver that is allowed by county regulations. In this regard, the Coastal Act requires that variances not be in conflict with the zoning regulation itself. If the project does not qualify for a variance or other authorized exemption, the permit must be denied and the Coastal Commission has done its job.

If the applicant wishes to pursue a regulatory taking claim, she has the option of filing an inverse condemnation lawsuit. Having been informed by the Coastal Commission "how far the regulation goes", a judge can now perform her task of determining whether the regulation "goes too far" and amounts to a compensable taking. This requires a trial with sworn witnesses, cross-examination, rules of evidence and other attributes of due process. These procedural safeguards protect both the landowner and the government. Taking claims are rarely successful. However, if the judge determines that a compensable taking has occurred, the government is then given the opportunity to rescind the regulation or apply any waivers *allowable by law* to avoid having to pay just compensation to the owner. *Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001).*[1] Like it or not, that is the system created by the legislature for resolving constitutional taking claims. No matter how the staff tries to couch it, the Coastal Commission is not vested with authority to decide constitutional taking claims, potential or otherwise.

That, in essence, is the Petitioner's argument. There is no need to repeat the discussion of the four cases cited in the Petition. The issue the Addendum struggles with has already been decided against it in *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602, *Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158, *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 and *LT-WR L.L.C. v. California Coastal Commission* (2007) 152 Cal.App.4th 770. If section 30010 were interpreted to give the Coastal Commission such authority, the statute would be unconstitutional. The power to decide constitutional taking questions is exclusively for the judicial branch.

[1] The staff seems to think that the Commission can exempt a project from LCP provisions even though the exemption is not authorized by the LCP. For example, it appears to believe that it can ignore prohibitions on building a residence in an ESHA and create an exception in order to avoid a taking claim. Not only would that be arbitrary and capricious decision making, but also it would amount to a repeal of the LCP, something the Commission lacks the power to do. *Yost v. Thomas* (1984) 36 Cal.3d 561, 572 ("The Commission is not authorized...to diminish or abridge the authority of a local government to adopt, and establish by ordinance, the precise content of its land use plan.")

The Addendum claims that it is mandated by section 30010 not to exercise its power in a manner that takes private property without just compensation. It is true that just compensation must be paid if governmental action results in a compensable taking. But there is no legislative mandate for the Commission to decide constitutional taking claims, potential or otherwise. Only courts have the authority to adjudicate constitutional taking issues. Granting a permit that violates LCP provisions based upon an assumption about what a landowner *might* do and whether a taking claim *might* be successful is speculative and, in effect, decides the ultimate question. *LT-WR, L.L.C. v. California Coastal Commission, supra.*

The staff Memorandum argues that if it must strictly comply with LCP regulations, it would not be able to address "nexus" and "rough proportionality" standards required by the Supreme Court in exaction cases. Memorandum pp. 4-5 That is not true. Courts often interpret statutes in order to save them from constitutional infirmity. *Ehrlich v. City of Culver City* 12 Cal.4th 854, 860. In the example of Section 30212 regarding public access, the Commission would be well advised to make factual findings in an individual case that satisfy the nexus and rough proportionality standards. This has nothing to do with the Commission's authority to make takings decisions. If the applicant wishes to file an inverse condemnation lawsuit, she may do so and a judge will determine whether the Commission's findings are supported by the evidence.

The suggestion that judicial review can be obtained by an "aggrieved" third party is not practical. First, this assumes that a white knight will appear and assume the role abdicated by the Commission staff. What if there is no white knight? The Commission is supposed to carry out the purposes and objectives of the Coastal Act and the certified LCPs. It cannot do that if it is in the applicant's corner. Second, assuming there is an "aggrieved person" opposed to the project with the financial means to pursue litigation, it would put the burden on the objector to file a lawsuit and prove a negative: i.e., that there is not a compensable taking. That is not the system created by the California legislature for addressing constitutional taking claims. *Hensler v. City of Glendale, supra.* If a permit is denied, it is incumbent on the applicant to file a petition for administrative mandamus joined with or followed by an inverse condemnation action. The staff's suggestion is impractical and ignores controlling California Supreme Court precedent.

Finally, the staff's policy operates under the radar. The public would not even know that the policy exists unless they stumbled onto it as I did.[2] The policy is not published anywhere. According to the Memorandum, some district offices do not use it at all. Others apply it selectively. Also, what is the standard of review? "Potential" means "possible", but the Addendum says "very high degree of confidence." Addendum p.3. Which is it? A policy that has the effect of undermining land use planning should not be shrouded in secrecy. The policy should be rescinded. Assuming that a policy could be constitutionally created, the Commission should do it the right way by conforming to APA procedure.

Respectfully submitted,

Richard S. Kohn

[2] As part of its proposed amendments to the Marin County LCP, the county has proposed a regulation that would require applicants for coastal permits to submit twelve categories of information to enable staff of the Community Development Agency to evaluate potential takings claims. I filed an objection with the Coastal Commission. In response, the Coastal Commission staff revealed that it had a similar policy and would approve the county proposal with some modifications.

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W7e

ADDENDUM

December 4, 2015

TO: California Coastal Commissioners

FROM: Christopher Pederson, Chief Counsel

RE: **Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria** (for the Commission Meeting of **December 9, 2015**)

On November 30, 2015, the Commission received the attached "Rebuttal to Coastal Commission Staff Report" (Exhibit 1) from Richard S. Kohn ("Petitioner"). The Rebuttal reiterates Petitioner's arguments that the Coastal Commission lacks the authority to evaluate whether the denial or conditional approval of a permit application would constitute a taking of private property for public use without just compensation.

As an initial matter, Petitioner contends that the staff report conflates his argument regarding the Commission's authority to evaluate takings claims with his argument that the Commission's interpretation of that authority is an underground regulation in violation of the California Administrative Procedures Act ("APA"). This item is on the Commission's agenda solely by virtue of the APA requirement that state agencies act on petitions to adopt, amend, or repeal regulations. (Gov. Code, § 11340.7.) Petitioner has characterized the Commission's interpretation of its authority to evaluate potential takings claims as an underground regulation. Absent his request that the Commission repeal that alleged underground regulation, he would not have a right to a Commission determination regarding that issue outside the context of a Commission proceeding on a regulatory matter such as a permit application or an LCP submittal. The staff report therefore analyzes his arguments through the framework of his request that the Commission repeal the alleged underground regulation regarding the Commission's evaluation of takings claims.

Petitioner's Rebuttal primarily argues that caselaw establishes that the Commission lacks the authority to evaluate potential takings claims. He contends that only courts may determine whether a Commission action to deny or conditionally approve a permit constitutes a taking. He claims that the Commission must in all instances require strict compliance with Coastal Act and LCP requirements and allow exceptions only pursuant to a court order.

As the staff report explains, the cases that Petitioner cites address the issue of whether courts are limited to the evidence presented to an agency when evaluating claims that that agency's action took private property without just compensation. (*See Hensler v. City of Glendale* (1994) 8 Cal.4th 1, *cert. denied,* 513 U.S. 1184 (1995); *Healing v. California Coastal Comm.* (1994) 22 Cal.App.4th 1158.) The decisions held that courts are not limited to considering evidence presented to the agency regarding takings claims. (*Hensler*, 8 Cal.4th at 15-16; *Healing,* 22 Cal.App.4th at 1174-1175.) Courts may instead allow additional evidence and argument when resolving those claims. Of course, the judiciary, not the Commission, has the final say over whether any particular Commission action constitutes a taking.

Petitioner, however, has not cited any caselaw that holds that the Commission lacks the authority to allow exceptions to Coastal Act or LCP requirements in order to avoid denying or conditionally approving a permit in a manner that would result in a taking. As the staff report points out, a recent appellate decision upheld the Commission's authority to do just that. (*McAllister v. California Coastal Comm.* (2009) 169 Cal.App.4th 912, 939.) Petitioner instead relies on statements that the courts, not the Commission, have the authority to resolve takings claims. That is not in dispute, but those statements in no way suggest that the Commission must disregard the mandate of Coastal Act section 30010 that the Commission not exercise its power in a manner that takes private property without just compensation.

Moreover, as explained in the staff report, the California Supreme Court has held that property owners must first apply for a permit and request exceptions from an allegedly unconstitutionally stringent limitation on development of property prior to seeking judicial review. As the Court explained,

> The impact of a law or regulation on the owner's right to use or develop the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property *and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction*.

(*Hensler*, 8 Cal.4th at 12 (emphasis added).) This is directly contrary to Petitioner's assertion that the Commission lacks the authority to consider whether to allow exceptions to Coastal Act or LCP requirements in order to avoid takings claims.

Petitioner also claims that the court of appeal in the *Healing* case specifically ruled that the Commission lacked the statutory authority to determine takings claims. That case, however, did not involve a situation in which the Commission had allowed exceptions in order to avoid a takings claim. The only issue before the court was whether the Commission's administrative record for the contested application should be the basis for the trial court's review of the property owner's inverse condemnation claim. (*Healing,* 22 Cal.App.4th at 1174-1175.) The court did not address whether the Commission could allow exceptions to Coastal Act or LCP requirements in order to avoid takings claims.

Petitioner contends that the Commission's interpretation of Coastal Act section 30010 prevents judicial review of whether requiring a proposed development to comply fully with all Coastal Act and LCP requirements would constitute a taking. Not so. Coastal Act section 30801

expressly allows any "aggrieved person" to seek judicial review of Commission decisions. Persons who through appropriate means notify the Commission of their concerns prior to the Commission action qualify as aggrieved persons. Therefore, a person who participated in the administrative process and opposed the Commission granting an exception in order to avoid a taking could seek judicial review of that decision.

Petitioner proposes that the Commission should never allow exceptions to Coastal Act or LCP requirements to avoid a taking except when a court orders it to do so. This would mean that the Commission must require complete compliance with those requirements even when it has a very high degree of confidence that doing so would constitute a taking. The burden would then be on the applicant to seek judicial review. If a court agrees with the applicant, the Commission may have the opportunity to allow exceptions in response to the court's order. Petitioner fails to point out, however, that even if the Commission allows exceptions pursuant to court order, it still could be found liable for temporary takings damages, court costs, and attorneys' fees. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304; *Hensler*, 8 Cal. 4th at p. 15.) Petitioner's approach, therefore, would require the Commission to expose itself and the public fisc to significant financial liability even when the Commission agrees that an applicant has a strong takings claim.

Finally, Petitioner repeatedly refers to Commission *staff* deciding whether to allow exceptions or to approve or deny permits. Of course, staff's role is to make recommendations to the Commission. The Commission itself decides on a case-by-case basis whether denying or conditionally approving a particular application would constitute a taking.

As explained in the staff report and this addendum, the only legally tenable interpretation of Coastal Act section 30010 is that the Commission has the authority to allow exceptions to Coastal Act and LCP requirements in order to avoid a taking when acting on permit applications. In addition, the staff report explained that the Commission does not have a rule of general applicability regarding how to evaluate whether a particular Commission action would constitute a taking. The Commission's formally adopted regulations authorize the Commission to require information related to evaluation of potential takings claims. Therefore, the Commission's interpretation and application of its authority to evaluate takings claims do not qualify as an underground regulation.

Staff therefore recommends that the Commission deny the Petition.

Exhibit

1. Richard S. Kohn, Rebuttal to Coastal Commission Staff Report, November 27, 2015

Before the California Coastal Commission
December 9, 2015 Meeting
Agenda Item No. W7e

Petition to Rescind Potential Taking/Taking Avoidance Criteria

Rebuttal to Coastal Commission Staff Report

Summary of Argument

The potential taking policy is an artifice to allow Commission staff to decide constitutional taking issues. The policy is bad law and bad public policy. It is bad law because the California Supreme Court has held that administrative agencies are not competent to decide whether their actions constitute a constitutional taking. It is bad public policy because it undermines land use policy designed to implement the Coastal Act. In the guise of making a *potential* decision, it precludes the courts—the only body vested with authority to decide constitutional taking issues—from determining whether a taking has *actually* occurred. In *LT-WR, L.L.C. v. California Coastal Commission* (2007) 152 Cal.App.4th 770, the court held that where the California Coastal Commission lacks authority to decide an issue, it cannot get around it by calling its decision "potential."

As the staff admits, taking questions are infinitely complex. The staff is simply not equipped to decide taking issues.[1] The Commission should direct the staff to rescind its "takings avoidance criteria" and confine itself, where a substantial issue has been presented, to deciding whether a proposed project conforms to the provisions of the county's LCP, and if not, whether any variances or waivers allowed by law apply. Once the Commission determines *how far* those regulations go, it is up to the courts to determine whether the regulation goes *too far* and thus constitutes a compensable taking.

The staff report conflates the taking issue with the APA issue. They are, of course, distinct issues. Even assuming, for the sake of argument, that the Commission has the authority to decide constitutional taking claims, it would have to be vetted through the APA procedures.

ARGUMENT

The policy undermines Land Use law reflected in Local Coastal Plans

Before addressing the legal issues raised by the staff report, it is important to see how the policy works in practice. Suppose someone wants to build a house in a sensitive habitat area or a floodplain where development is prohibited. The staff could conclude that the owner could raise a potential taking claim.

[1] For example, the "takings avoidance criteria" excludes cases which would result in a nuisance. But how is this issue to be decided? Would the agency decide whether a project would "potentially" give rise to a nuisance defense? The Commission staff is not equipped to decide such complex factual questions that would require procedural safeguards such as sworn testimony, cross-examination and possibly expert witnesses. Where nuisance can be shown, the government would not have to pay compensation even where the facts would otherwise amount to a taking. Only a court can adjudicate these issues in the context of an inverse condemnation action.

To avoid such a claim, the staff claims that it has authority to allow the development to proceed. The applicant, who now has been granted a coastal permit, obviously lacks any incentive to bring an inverse condemnation case. The staff is essentially aligned with the owner instead of being in an adversarial relationship. This means that the question of whether there is an actual compensable taking will never be reviewed and determined by a judge after a trial. The potential taking decision reached by staff has become the actual decision and the administrative staff has supplanted the judicial branch as the ultimate decider. The staff report asserts that the courts would have the final say but in fact they would have "no say." The LCP provisions intended to protect coastal resources have been undermined. The critical role of the judiciary in deciding taking claims has been eliminated. The Coastal Commission lacks the resources to conduct a full blown trial on the taking issue as required by the California Supreme Court. The allocation of roles between the agency and the courts governing taking claims is designed to prevent this scenario from happening.

The Staff Report misinterprets Section 30010 of the Coastal Act

The staff's reply to the petition boils down to the contention that section 30010 of the Coastal Act vests it with authority to decide whether the denial of a permit application would potentially result in a constitutional taking. *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602 and *Healing v. California Coastal Commission (1994)* 22 Cal.App.4th 1158 hold otherwise. Section 30010 simply reflects the state and federal constitutional provisions requiring that where a taking is judicially established, just compensation must be paid.[2]

If the Staff's interpretation were correct, there would be no need to engage in the charade of deciding whether there would be a *potential* taking: it would have the authority to decide the taking issue, period. The Staff contends that "Because the Commission does not have the authority to acquire property, Section 30010 requires the Commission to construe the Coastal Act as not requiring denial of a permit in that situation." But regulatory taking jurisprudence is not about forcing the Coastal Commission to acquire property: it is about paying just compensation if application of the LCP results in a compensable taking as determined by a court.

The Staff misunderstands an important ruling by the Supreme Court in *Hensler v. City of Glendale (1994)* 8 Cal.4th 1, *cert. denied,* 513 U.S. 1184 (1995). The court pointed out that an inverse condemnation lawsuit has two phases: the first phase is to determine whether a compensable taking has occurred. If a taking is established after a trial, prior to commencing the second phase (a jury trial to determine the amount of compensation), the governmental agency has the opportunity to rescind the regulation or grant such exemptions as may be allowed by law, and thereby avoid having to pay compensation. *Id.* at pp. 13, 14. In that context, the courts have said that government cannot be forced to exercise its power of eminent domain: it will be given the opportunity to make adjustments to the law. The fact that the Coastal Commission does not have the power of eminent domain and cannot acquire or hold interests in real property has nothing to do with the interpretation of section 30010.

[2] In *Sierra Club* the court reasoned that section 30010 was included in the statute to avoid a facial attack on the Coastal Act as violating constitutional taking provisions.

Furthermore, courts must interpret statutes to avoid serious constitutional questions. *Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1357.* The staff's interpretation would create a serious constitutional problem. In *Hensler,* the California Supreme Court held that administrative agencies are incompetent to decide whether their own action constitutes a constitutional taking. The only viable interpretation of section 30010 is that reached by the court in *Sierra Club:* that section 30010 is simply declarative of state and federal constitutional taking provisions. The Coastal Commission's authority is limited to making and enforcing rules and deciding whether to grant permits; "It is not an adjudicatory body authorized to decide issues of constitutional magnitude." *Healing* Id. at p.1178.

The staff report relies on *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912 in support of its argument. *McAllister* did accept that theory. However, what is noteworthy about the case is that the court cited no authority other than a treatise on California Land Use Law and did not discuss any of the four seminal cases cited in my petition although they had all been decided prior to 2008 and were plainly relevant. It is also of interest that the article relied upon by the court was authored by three former attorneys employed by the California Coastal Commission. They undoubtedly advanced the theory which the staff has long been applying. In any event, the California Supreme Court trumps the courts of appeal, and *Hensler* is dispositive: administrative agencies are not vested with authority to decide constitutional taking issues.

McAllister also underscores the fact that "[w]hether the owner has been denied substantially all economically viable use of the property is a factual inquiry that requires the analysis of such factors as the economic impact of the regulation, interference with the landowner's reasonable, investment-backed expectations and the character of the government action." *Id.* at p. 940. Allowing the Commission staff to undertake this adjudicatory role simply cannot be reconciled with the Supreme Court's admonition that agencies are not competent to adjudicate constitutional taking claims.

Nor does characterizing a decision as a *potential* decision, legitimize it. In *LT-WR L.L.C. v. California Coastal Commission*, (2007) 152 Cal.App.4th 770, the court held that where the Coastal Commission lacks authority to adjudicate an issue, calling the decision "potential" is speculative and is tantamount to deciding the issue and is reversible error.

The Staff acknowledges that in *Sierra Club* "the court of appeal held that concerns about future takings claims were not a proper basis for refusing to designate habitat as ESHA in an LUP."[3] In that case, the applicant had sought to challenge the Commission's adoption of the LUP, not the grant or denial of a permit. Staff claims that the court implied that taking claims could be raised at the permit stage, but did not decide that issue. So, what does the phrase "permit stage" mean?

As described in my petition, the Legislature and the courts have established a procedure by which applicants who have been denied a permit can resort to the courts to adjudicate a taking claim. The proper role of the agency is to apply the LCP and any variances or waivers *allowed by law. Palazzolo v. Rhode Island,* 533 U.S. 606, 621 (2001). Whether a taking claim even exists cannot be determined until "the hearings are concluded and the Commission reaches its decision and completes its formal findings."

[3] In *Sierra Club,* Mendocino County was contending that the Coastal Commission was entitled to balance concerns that granting ESHA status might constitute a prohibited taking of private property without just compensation.

Healing Id. at p. 1175. So, the "permit stage" is after the agency has finished its work. By deciding how far its regulations go, the case is now in a posture for a judge to determine whether it goes too far and requires compensation. Nothing in *Sierra Club* implies that the statute would have a different meaning at the "permit stage" or that the agency can decide constitutional questions. If there was any doubt, it was removed by *Hensler.*[4]

Staff argues that it has the ability to allow exceptions to land use requirements, including variances. That is true, but the allowance of a variance has nothing to do with taking analysis. If a regulation would require the denial of a coastal permit, it is proper for the agency to consider whether a variance can be granted. However, Section 65906 of the Government Code sets forth the standards for granting variances from land use regulations. It states in part: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property." In other words, a variance cannot be granted if the use is prohibited by the LCP.

If the LCP would prohibit the development, and no variance or waiver is legally authorized, the coastal permit must be denied. The disappointed applicant then has the option of filing an inverse condemnation case in court to decide any taking claim she wishes to raise.[5]

The policy is an underground regulation and violates the APA

Even assuming the Commission was vested with authority to decide constitutional taking questions, it is necessary to publish it under the APA. To be deemed an underground regulation, the policy must meet two requirements: (1) the agency must intend it to apply generally rather than in a specific case; and (2) the agency must adopt it to implement, interpret or make specific the law enforced by the agency." *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1381. Given the decisions in *Sierra Club v. California Coastal Commission* and *Healing v. California Coastal Commission*, it is impossible to say, as the Staff maintains, that there is only one interpretation of section 30010. The potential taking policy is clearly intended to implement Section 30010. And even the staff concedes that the requirement that all applicants who claim that application of a regulation would deprive their property of all economic value must submit 12 categories of information, could be read as a regulation of general applicability. Staff Report p.7 fn.2. "A rule applies generally so long as it declares how a certain class of cases will be decided." *Taye v. Coye (*1994)29Cal.App.4th1339,1345("the method was a regulation because it was a standard of general application applied to every Medi-Cal case reviewed by the Department audit teams and used to determine the amount of overpayment.)" The policy is an underground regulation requiring vetting under the APA.

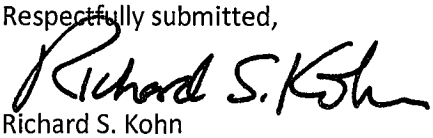
[4] If the permit applicant anticipates that the agency decision will result in a taking, nothing prevents her from presenting evidence at the administrative level going to that issue in order to make a record. Indeed, it would be prudent to do so. Even though relief on a constitutional issue is unavailable at the administrative level, the applicant still must exhaust administrative remedies before making a constitutional challenge in the courts. *Leek v. Washington Unified School Dist.* 124 Cal.App.3d 43, 52.

[5] The availability of a judicial remedy does not mean that a disappointed applicant would pursue it. Litigation is expensive and taking cases are rarely successful. This is another reason why Commission staff disserves the Coastal Act by prejudging the issue and assuming that an inverse condemnation case might be pursued. Furthermore, if the county has rejected a coastal permit as violating the LCP, and the Commission finds "no substantial issue" to warrant an appeal, it appears that any case would be against the county and not the Commission.

Conclusion

The staff report illustrates the complexities of taking jurisprudence better than I could. Commission staff are not judges. The proper role of the Coastal Commission is to determine whether the proposed development is consistent with the LCP and, if not, whether any variances or waivers allowed by law are available. Taking claims are for the judicial branch to resolve.

Respectfully submitted,



Richard S. Kohn

November 27, 2015

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MEMORANDUM

November 20, 2015

TO: California Coastal Commissioners

FROM: Christopher Pederson, Chief Counsel
Michael Ng, Staff Counsel

RE: **Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria** (for the Commission Meeting of **December 9, 2015**)

EXECUTIVE SUMMARY:

On September 18, 2015, Richard S. Kohn (the "Petitioner") filed a "Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria" (the "Petition") with the Commission. The Petitioner argues that the Commission's policy of allowing exceptions to Coastal Act or Local Coastal Program ("LCP") requirements when necessary to avoid taking private property without just compensation constitutes an "underground regulation" and that the Commission lacks the authority to evaluate when its actions may constitute a taking. He therefore requests that the Commission rescind the alleged underground regulation.

The Commission's practice of allowing case-by-case exceptions to Coastal Act or LCP requirements when acting on coastal development permit ("CDP") applications or appeals does not constitute an underground regulation. The California Administrative Procedures Act defines a regulation as a rule of general application adopted by a state agency to implement, interpret, or make specific the law the agency administers. Both the United States and the California Constitutions prohibit state agencies from taking private property without just compensation. Consistent with these prohibitions, Section 30010 of the Coastal Act directs the Commission not to grant or deny a permit in a manner that will take private property without just compensation. Because judicial rulings establish that takings can occur in a variety of contexts and that a determination about whether a taking has occurred depends on a wide range of context-specific factors, the Commission necessarily evaluates potential takings claims on a case-by-case basis. The Commission does not have a rule of general applicability regarding how it evaluates potential takings claims.

Commission staff therefore recommends that the Commission deny the Petition.

RECOMMENDED MOTION:

*I move that the Commission grant the Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria and recommend a **NO** vote pursuant to the staff recommendation.*

Failure of this motion will result in denial of the Petition for the reasons provided in this staff report.

BACKGROUND:

On May 25, 2015, Richard Kohn filed a petition with the Office of Administrative Law ("OAL") alleging that the Commission has an unlawful underground regulation regarding its evaluation of potential takings claims. On August 4, 2015, OAL declined to accept the petition, but did not rule on its merits and indicated that the decision did not restrict his ability to pursue the matter with the Commission or in court. On September 18, 2015, Petitioner filed the attached Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria (Exhibit 1) with the Commission.

The California Administrative Procedures Act ("APA") allows any person to file a petition requesting the Commission to adopt, amend, or repeal a regulation. (Gov. Code, § 11340.6.) The Commission must within 30 days of receipt of the petition either deny it on the merits or schedule a public hearing. (Gov. Code, § 11340.7, subd. (a).) Petitioner agreed to extend the deadline for Commission action until the Commission's December 2015 meeting.

The Commission may take any action it determines is warranted by the Petition. (Gov. Code, § 11340.7, subd. (b).) If the Commission decides to change its regulations in response to the Petition, it must follow the normal notice and comment procedures that apply to agency actions to adopt, amend, or repeal regulations. (Gov. Code, § 11340.7, subd. (a).)

ANALYSIS:

I. Relevant Law Regarding Underground Regulations Subject to the APA

The APA's prohibition against "underground regulations" is set forth as follows:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (Gov. Code § 11340.5(a).)

In turn, the APA defines a "regulation" as follows:

> [E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (*Id*. § 11342.600.)

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 ("*Tidewater*"), the California Supreme Court explained the criteria for determining whether agency action constitutes a regulation subject to the APA:

> First, the agency must intend its rule to apply generally, rather than in a specific case … a rule applies generally so long as ***it declares how a certain class of cases will be decided***. [Citation.] Second, the rule must ***implement, interpret, or make specific the law enforced or administered by the agency, or … govern the agency's procedure*** [with respect to the law enforced or administered by the agency]. (*Id*. at 571 (emphasis added).)

The APA includes a variety of exemptions from the general requirement that regulations must go through that Act's formal rulemaking procedures. Of most relevance here, it exempts regulations that "embod[y] the only legally tenable interpretation of a provision of law." (Gov. Code § 11340.9(f).)

As explained below, the Commission's interpretation of Coastal Act section 30010 as requiring it to allow exceptions to Coastal Act or LCP requirements in the permitting context when necessary to avoid taking private property is the only legally tenable interpretation and therefore does not need to be adopted as a regulation. The Commission evaluates claims that a particular permitting decision may constitute a taking on a case-by-case basis and does not impose requirements of general applicability regarding how to evaluate and resolve such claims. The Commission's existing regulations authorize requiring information that is necessary for evaluating potential takings issues that a particular application may raise. The Commission's practices regarding the evaluation of potential takings claims therefore do not constitute an unlawful underground regulation.

II. Requirements To Avoid Taking Private Property Without Just Compensation

The United States and California Constitutions both prohibit state agencies from taking private property for public use without payment of just compensation. (U.S. Const., 5th Amend., 14th Amend.; Cal. Const., Art. 1, § 19.) Coastal Act section 30010 implements these prohibitions by providing that the Coastal Act

> shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to [the Coastal Act] 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 therefor.

The Coastal Act does not give the Commission the power of eminent domain or otherwise authorize the Commission to acquire or hold interests in real property.

The classic taking occurs when the government acquires title to property for a public use. The U.S. Supreme Court, however, has held that a taking can also occur when a government requirement "goes too far" in restricting an owner's use of its property. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.)

Regulatory takings claims can arise in a variety of contexts. (See generally *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 536-40, 545-48.) The complete denial of all economically beneficial use of a property constitutes a per se taking unless development of the site can be prohibited as a nuisance or under other background principles of state property law. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, 1031-32.) A *Lucas* taking can be a concern where, for example, a property that is zoned for residential use consists entirely of environmentally sensitive habitat area (ESHA). Coastal Act section 30240(a) allows development within ESHA only if it avoids significant disruption of habitat values and is a use dependent on the resources of the ESHA. (See *McAllister v. California Coastal Comm.* (2009) 169 Cal.App.4th 912, 928-29.) Residential development does not qualify as a resource dependent use in ESHA. (*Id.* at 935-36.) In a situation where a property owner applies to build a house on residentially zoned property that is entirely ESHA, complete denial of the proposed development as would be required by section 30240(a) may constitute a taking under the *Lucas* decision unless some other economically beneficial use is available, absent unusual circumstances. Because the Commission does not have the authority to acquire property, Public Resources Code section 30010 requires the Commission to construe the Coastal Act as not requiring denial of a permit in that situation. (See *McAllister,* 169 Cal.App.4th at 937-40.)

A taking claim can also arise if the Commission allows some economically beneficial use of a site, but such use is so restrictive that it still constitutes a taking of private property without just compensation. (See *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104.) In such circumstances, whether the restrictions on development constitute a taking "depends largely upon the particular circumstances [in that] case." (*Id.* at 124 (internal quotation marks omitted).) The Court elaborated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. 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.

(*Id.* (internal citations omitted).) As this makes clear, the evaluation of *Penn Central* takings claims is very fact- and context-specific and the list of factors identified in *Penn Central* is only a non-exhaustive list of potentially relevant factors.

Takings claims can also arise in situations where the Commission requires an exaction, for example, the dedication of a public access easement to or along the shoreline pursuant to Coastal Act section 30212. In *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, the Supreme Court invalidated a Coastal Commission permit condition requiring dedication of a public access easement along a private beach that the Commission imposed as a condition of approval for a new residence constructed adjacent to the beach. The Court ruled that the Commission had failed to establish a nexus between the impacts of the proposed development

and the required public access easement. (*Id.* at 837.) Subsequent caselaw establishes that public agencies must demonstrate both that ad hoc exactions of property interests have a logical nexus with impacts caused by the proposed development and that the magnitude of the exaction is roughly proportional in nature and extent to the impacts of the development. (*See Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 869-75.) Coastal Act section 30212 includes a number of exceptions to its general requirement that new development along the shoreline provide public access, but those statutory exceptions do not incorporate the nexus and rough proportionality requirements of these United States and California Supreme Court decisions. For the Commission to require strict compliance with section 30212 even when the Commission does not have a sufficient basis to make legally adequate findings regarding nexus and rough proportionality would be inconsistent with this binding legal precedent.

For the Commission to acquire an applicant's property in circumstances where mandating complete compliance with Coastal Act or LCP requirements would constitute a taking is not an available remedy. The Coastal Act does not give the Commission the power of eminent domain or otherwise authorize it to acquire interests in real property.

III. The Commission's Authority To Allow Exceptions In Order To Avoid Takings

Despite these constitutional requirements and the clear language of Section 30010 prohibiting the Commission from acting on a permit in a manner that results in a taking, Petitioner contends that the Commission lacks the authority to allow exceptions in order to avoid a taking. He makes two arguments in support of this position: that the court of appeal in *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602 ("*Pygmy Forest*") ruled that the Commission lacked that authority and that appellate rulings in other cases more generally provide that only courts, not public agencies, may determine whether a taking has occurred. Both arguments lack merit.

In the *Pygmy Forest* case, the Commission had decided to certify the Mendocino County Land Use Plan ("LUP") without requiring that an unusual habitat type known as pygmy forest be designated as environmentally sensitive habitat area ("ESHA"). The Sierra Club sued and the court of appeal ultimately ruled that substantial evidence did not support the Commission's decision. (12 Cal.App.4th at 612-17.) Mendocino County argued that, even if pygmy forest qualified as ESHA, the Commission could refuse to designate it as such because the strict limits on development in ESHA would result in unconstitutional takings of private property. The court of appeal held that concerns about potential future takings claims were not a proper basis for refusing to designate habitat as ESHA in an LUP. The court indicated that potential takings claims should instead be addressed at the permit stage. Although the court noted that the Coastal Act prohibits uncompensated takings, it nowhere stated that the Commission could not allow exceptions to LCP requirements at the permit stage in order to avoid a taking. The case simply did not present that issue. (*Id.* at 617-18.) Moreover, subsequent caselaw expressly acknowledges that section 30010 "establish[es] a narrow exception to strict compliance with restrictions on uses in habitat areas based on constitutional considerations." (*McAllister*, 169 Cal.App.4th at 939.) The *Pygmy Forest* decision therefore does not support Petitioner's argument that the Commission lacks the authority to allow exceptions to Coastal Act and LCP requirements at the permit stage in order to avoid a taking.

Petitioner's argument that only courts, not public agencies such as the Commission, may evaluate takings claims is also misplaced. The two cases upon which Petitioner relies do hold that courts have the final say regarding the merits of takings claims and that courts evaluating takings claims (technically, "inverse condemnation" claims) are not limited to the evidence presented to the agency that allegedly committed the taking. (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 15-16; *Healing v. Cal. Coastal Com.* (1994) 22 Cal.App.4th 1158, 1178.) These cases, however, do not in any way restrict an agency's ability to consider whether to allow exceptions to land use requirements in order to avoid potential takings claims. To the contrary, the California Supreme Court in the *Hensler* case stressed the importance of land owners going through the process of seeking variances or exceptions to land use restrictions prior to seeking judicial review and noted that evidence regarding a potential taking claim may be presented during the administrative proceeding. (8 Cal. 4th at 10-12, 15.) If it were in any way improper for agencies to consider exceptions to land use requirements in order to avoid takings claims, the Supreme Court would not have stressed the importance of exhausting administrative agency remedies in the way that it did.[1]

The Commission's position that it may allow exceptions to Coastal Act permitting requirements when necessary to avoid a taking is the only legally tenable interpretation of section 30010 and therefore not an underground regulation.

IV. The Commission's Method Of Evaluating Takings Concerns

Petitioner's argument that the way in which the Commission evaluates potential takings constitutes an underground regulation rests on a fundamental misunderstanding of how the Commission evaluates potential takings claims. Petitioner contends that the Commission has established a rule of general applicability regarding information that applicants must submit to the Commission whenever an application raises takings concerns. To support this claim, he points to the" Takings Information" handout that Commission staff sometimes provides to applicants in connection with a determination that an application raising takings concerns is incomplete. (See Exhibit 1, attachment 1 (p. 9 of 59).)

As noted previously, an agency rule qualifies as a regulation if it 1) declares how a certain class of cases will be decided and 2) implements, interprets, or makes specific the law that the agency enforces. (*Tidewater Marine Western,* 14 Cal.4th at 571; Gov. Code, § 11342.600.)

The Takings Information handout does not declare how a certain class of cases (CDP applications presenting takings issues) will be decided. Neither the "Background" nor "Information Needed" sections of the handout declares how potential takings cases will be decided. The "Background" section briefly summarizes the Commission's prior understanding of overarching takings jurisprudence which informs the purpose of the handout. The "Information Needed" section requests factual information which may inform the Commission's evaluation of a potential takings case on an ad hoc basis consistent with takings jurisprudence. (*See Pratt Const. v. Cal. Coastal Com.* (2008) 162 Cal.App.4th 1068, 1080-81 ["Whether a regulation becomes a taking … will rest on an ad hoc factual inquiry into the particular

[1] Petitioner also cites *LT-WR v. California Coastal Commission* (2007) 152 Cal.App.4th 770. That case did not address the authority of either the Commission or the courts to address takings claims.

circumstances of the case"]; *see also Penn Central Transp. Co. v. NYC* (1978) 438 U.S. 104, 124 [describing takings analyses as "essentially ad hoc, factual inquiries"].)

The handout specifically states: "Since the Coastal Commission must analyze whether its action in denying a permit application would constitute a taking, in order to comply with Section 30010 of the Coastal Act and the California and United States Constitutions, the application filing requirements shall include information about the nature of the applicant's property interest." In other words, the handout merely requests information from a CDP applicant so that the Commission may perform an ad hoc takings analysis if necessary; it does not declare whether or how the Commission will decide potential takings cases. Furthermore, the information requested by the handout reflects the type of information that the Commission has previously requested for prior CDP applications presenting takings concerns.[2]

The various District offices, as well as the Commission itself, consider every CDP application which presents potential takings issues on a case-by-case basis. This is necessarily and unavoidably the case because judicial precedent as summarized above precludes the possibility of imposing a uniform set of criteria to apply to all takings claims. That the Takings Information handout requests applicants to submit certain information that may help the Districts and the Commission to perform an ad hoc takings analysis if necessary does not alter this fact. The handout does not limit the various Districts' or the Commission's discretion to determine exactly what information is necessary in any particular case or to evaluate the takings concerns that a particular CDP application may raise based on the specific facts of that case.

In addition, Commission staff does not require all applicants in situations that raise potential takings claims to provide the information listed on the handout. Some districts do not use the handout at all. Others use it in situations where staff believes that the information listed on the handout is necessary to adequately evaluate takings issues, but not in others where the information is not necessary. Staff also considers applicants' arguments that the information listed on the handout is not necessary in their particular case.

In situations where Commission staff and an applicant reach an impasse regarding whether information identified on the handout is necessary for an application to be complete, the applicant has the right to appeal staff's determination to the Commission. (14 Cal. Code Regs., § 13056(d).) The Commission may independently determine whether it needs the additional information from the applicant in order for the application to be complete. The Takings Information handout does not in any way limit the Commission's discretion to determine what information is necessary to evaluate the takings issues that a particular project may raise. The handout therefore is not a rule of general applicability.

Finally, the Commission's existing regulations already authorize the Commission to require the information identified on the Takings Information handout. (See 14 Cal. Code Regs., § 13053.5.) Section 13054.3(a) requires applicants to submit an adequate description "sufficient to determine whether the project complies with all relevant policies of the Coastal Act, including

[2] Some of the language in the handout, when read in isolation, could be construed as articulating an across-the-board requirement. Commission staff has not applied it in that way, however. To avoid any potential confusion, the handout will be revised to clarify that the necessary information can vary depending upon the circumstances of a particular application.

sufficient information concerning land and water areas in the vicinity of the site of the proposed project." Subdivision (b) requires "[a] description and documentation of the applicant's legal interest in all the property upon which the work would be performed." Finally, subdivision (e) requires applicants to submit "[a]ny additional information deemed to be required by the commission or the commission's executive director for specific categories of development." Section 13056 requires staff to file an application only after finding that the application is complete.

These provisions of the Commission's existing regulations accordingly give Commission staff broad discretion to evaluate whether an applicant has submitted sufficient information with an application to determine compliance with Coastal Act requirements, including section 30010, and to allow evaluation of the applicant's legal interest in the property and any restrictions that may apply to that legal interest. Information related to whether the denial or conditional approval of a project would take a property interest owned by the application falls within the scope of this requirement. The regulations also allow staff to require additional information for specific categories of development, which can include development that is required to be approved in order to avoid a taking. The Commission's existing formally adopted regulations therefore provide a sufficient legal basis for staff to request the information identified on the Takings Information handout when determining the completeness of an application.

CONCLUSION:

Because the Commission has the authority and the legal obligation to evaluate whether its permitting actions may take private property without just compensation and because it performs this evaluation in the case-by-case manner that judicial precedent requires, the Commission's practices regarding how it evaluates potential takings claims do not constitute an underground regulation. The Commission should therefore deny the Petition.

Exhibits

1. Richard S. Kohn, Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria

September 18, 2015

5 Ahab Drive
Muir Beach, CA 94965

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Petition to Rescind Potential Takings Evaluation/Takings Avoidance Criteria

Introduction

This petition addresses the validity of the potential takings evaluation that has been created and implemented by the commission staff. Pursuant to that policy, in situations where a denial of a permit raises potential takings concerns, the staff evaluates whether or not to approve a project even if it means overriding applicable regulations. The policy has never been formally adopted by the Commission. The policy has been stated in written form in a "Takings Information" bulletin attached hereto which requires claimants who may raise a takings claim to provide 12 categories of information to aid the staff in its evaluation. **Attachment I.**[1] I request that you rescind that policy because it violates controlling decisions of the California Courts of Appeal and the California Supreme Court. Administrative agencies are not free to ignore such precedent

Takings claims arise when the government takes private property for public purposes. The classic example is when government physically occupies private property by eminent domain. But the courts have recognized that, depending on the facts, a taking can occur by the application of zoning regulations. State and federal constitutional takings clauses do not prevent the government from taking property but require that if the complex rules governing takings lead to a *judicial* determination that a constitutional taking has occurred, the owner is entitled to be compensated. Regulatory takings claims are rarely successful unless the effect is to deprive the property of all economic value. Takings claims require the application of complex legal standards to specific factual situations. The question is: "who gets to decide?"

The case for rescission is based on four cases. In three of them, the California Coastal Commission was the defendant. These cases establish that the Commission staff has misinterpreted Public Resources Code sec. 30010; that it has no authority to address takings issues, potential or otherwise; and that evaluating whether application of the LCP would potentially give rise to a takings claim is speculative and invalid.

[1]The Takings Information bulletin is limited to situations where the owner claims that application of a regulation would deprive the property of all economic value. But statements made by staff would apply it to any case of alleged regulatory taking. Whatever the scope of the policy, it is invalid on its face.

Argument

I. The Commission is Without Authority to Decide Constitutional Takings Issues

1. The staff has misinterpreted Public Resources Code Section 30010

The staff erroneously claims a mandate in Section 30010 of the Coastal Act[2] to consider the issue of constitutional taking where strict application of zoning regulations would potentially give rise to a takings claim. In *Sierra* Club *v. California Coastal Commission* (1993) 12 Cal.App.4th, 602, 617-618, the Court of Appeal held the opposite. The court says:

> "The County relies on section 30010, which expresses a legislative intent that the Coastal Act *not* grant the Commission or any county the '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 therefor....' However, that does not support the anticipatory sort of takings balancing advocated by the County. The section appears designed to foreclose any claim that the Coastal Act authorizes takings *without compensation,* a construction which would leave the Act open to a facial challenge, (citations omitted) It does not ask the Commission to balance takings concerns in ESHA decisions."

(emphasis in original)[3] So, section 30010 is simply declaratory of state and federal constitutional takings provisions: If a taking is established using the proper judicial procedures, just compensation must be paid. There is no mandate in Section 30010 for the Coastal Commission to do a takings analysis. Even if there was any doubt about this, courts must interpret statutes to avoid serious constitutional questions. As shown below, adopting the staff's interpretation would create an insurmountable constitutional question.

2. The CCC has no authority to decide takings claims

In *Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158, 1178, the Court of Appeal had this to say about the authority of the Coastal Commission to decide takings issues: "...the Coastal Commission is not legislatively authorized to consider much of the evidence and many of the issues relevant to an inverse condemnation action. To the contrary, the Commission's powers and duties are only those vested in it by the Coastal Act....In short, the Commission is authorized to make and enforce rules and whether to grant permits. It is not an adjudicatory body authorized to decide issues of constitutional magnitude."

[2] Section 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."

[3] In *Sierra Club* the argument regarding the interpretation of Section 30010 was made by the county. The Coastal Commission successfully argued that the case was not ripe for adjudication. But the potential takings policy that is being applied by the commission staff is based upon the same interpretation that the court rejected in *Sierra Club.*

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the California Supreme Court held that whether a constitutional taking has occurred is a judicial question that can be addressed only after administrative remedies provided by the state have been completed. The Supreme Court, quoting from another case, says:

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue...[U]ntil there has been a 'final, definitive position regarding' how the regulations will be applied to the land, a court cannot determine whether a compensable taking has occurred."

Id. p.10. Later, the Court says:"We agree with the *Healing* court, however, that an administrative agency is not competent to decide whether its own action constitutes a taking...." *Id.* p. 15-16. In other words, the role of the agency is to decide whether the development violates the LCP: constitutional taking issues are for the courts to decide. For an agency to use taking analysis to decide whether or not an application for a coastal permit should be granted is putting the cart before the horse.

In addition to making clear that the agency is not competent to decide whether a taking has occurred, the Supreme Court in *Hensler* addressed the procedures that must be followed by the applicant in making a takings claim. In California, that requires the owner of the subject property to file an administrative mandamus action ("as applied" takings) or a declaratory judgment action ("facial" takings) to establish whether a taking has occurred; joined with or followed by an inverse condemnation action to determine damages, which must be tried by a jury unless waived. A necessary predicate to filing such an action is a final agency decision applying its regulation to the land in issue.

Furthermore, the evidence must be presented by witnesses under oath and subject to cross-examination and other procedural requisites, so an administrative record that may have been compiled by the agency without these safeguards is not sufficient. *Hensler*, *Id.* p. 16.

3. *A decision that application of the LCP would potentially give rise to a takings claim is speculative and tantamount to deciding the taking issue*

The fourth and final nail in the coffin is *LT-WR, L.L.C. v. California Coastal Commission* (2007) 152 Cal.App.4th 770. In that case the Commission had denied a permit to erect gates and no trespassing signs on private property, premised on the existence of "potential" prescriptive rights. In heading "c" preceding its discussion, the court said: "....*in the absence of a judicial determination* that prescriptive rights exist for public use....the Commission's denial of a permit for gates and signs posted on the ground that potential prescriptive rights exist was speculative." (emphasis added) 152 Cal.App.4th at 805.

The Court of Appeal held:

> "Inherent in one's ownership of real property is the right to exclude uninvited visitors. (citation omitted) The Commission's decision would deny LT-WR that right. In precluding LT-WR from barring the public from traversing its property on the theory that 'potential exists to establish prescriptive rights for public use of this road,' the Commission in effect decreed the existence of such prescriptive rights.
>
> We recognize one of the basic mandates of the Coastal Act is to maximize public access and recreational opportunities within coastal areas.....However, the Commission is not vested with the authority to adjudicate the existence of prescriptive rights for public use of privately owned property. In denying LT-WR a permit for the gates and no trespassing signs due to the possibility of prescriptive rights, the Commission in effect gave credence to the claimed prescriptive rights. The Commission's denial of a permit for the gates and signs, premised on the existence of 'potential' prescriptive rights, was speculative and properly was overturned by the trial court."

152 Cal.App.4th at 806. This holding regarding prescriptive rights is indistinguishable from the application of the potential takings policy. As *Healing* and *Hensler* make clear, the Coastal Commission lacks authority to adjudicate the existence of takings claims.

4. *Only a judicial proceeding with the full panoply of procedural protections can decide takings questions.*

One can appreciate the motivation of governmental agencies to avoid having to pay compensation if a taking claim is successful. But the answer is not to prejudge the issue in an administrative forum that can only be determined after a full blown trial. In *Hensler,* the Supreme Court addressed this very problem and provided a remedy after the court has decided

that application of regulations results in a taking but before the amount of compensation due to the owner has been decided in the inverse condemnation phase:

> "The California procedural requirements to which plaintiff objects do no more than ensure to the state its right to a prepayment judicial determination that the ordinance or regulation is excessive and will constitute a taking, thus affording the state the option of abandoning the ordinance, regulation or challenged action, or exempting parcels from its scope if the regulation or use is excessive. As we noted above, the United States Supreme Court has recognized repeatedly the right of the state to reserve the option of rescinding a statute that imposes excessive regulation, ..." 8 Cal.4th at 19.

The California legislature has created a procedure for how constitutional takings claims are to be adjudicated. Takings claims involve the application of complex legal standards to *ad hoc* factual situations, and the development of an evidentiary record with full procedural protections. The Commission staff's potential takings evaluation undercuts that procedure and insulates takings issues from judicial review: if the agency grants a permit in order to avoid a takings claim, the applicant for the permit has no incentive to file a mandamus action to determine whether a compensable taking has *actually occurred,* something only a court can decide. Paradoxically, it puts the Coastal Commission in a position where it is acting as the applicant's surrogate, rather than its adversary.

As the Supreme Court has held, the proper role of the government agencies is to apply the regulatory provisions, together with any applicable variances, conditional use permits or other regulatory devices that would excuse compliance in a particular case. *Williamson Co. Regional Planning v. Hamilton Bank* 473 U.S. 185, 187-88 (1985); *First Lutheran Church v. Los Angeles,* 482 U.S. 318, 321 (1987); *Southern Pacific v. City of Los Angeles* 922 F.3d 498 503 & note 5 (9th Cir. 1990); *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 281-282. Once a final administrative decision is made that proposed development cannot be permitted because it violates the LCP, the owner has the option of filing a petition for a writ of administrative mandamus for a judicial determination of whether the agency action has amounted to a compensable taking. Takings issues are exclusively within the province of the courts to decide.

In summary, the potential takings evaluation misinterprets Section 30100, insulates the Commission's decisions from judicial review, negates the normal procedure for raising and deciding takings claims in the courts, violates the separation of powers and the principles of *res judicata* and *stare decisis* and undermines land use regulation in the coastal zone.

II. The Potential Takings Policy Violates the APA

In addition to being an unlawful exercise of authority, the potential takings policy/takings avoidance criteria violate the Administrative Procedure Act because it is an underground regulation. I intend to preserve that issue. Rather than repeating the arguments that I have previously made, I incorporate by reference the petition I submitted to the OAL as though fully incorporated herein.**Attachment 2.**[4]

Respectfully submitted,

Richard S. Kohn

[4] Even though the OAL declined to decide the issue, that decision has no bearing on the merits and does not restrict the right to pursue the matter before the Coastal Commission or in the courts. **Attachment 3.**

ATTACHMENTS

1. "Takings Information" bulletin
2. Petition to the Office of Administrative Law June 3, 2015
3. Letter from Office of Administrative Law dated August 4, 2015

Attachment 1

ATTACHMENT 2

STATE OF CALIFORNIA -- THE RESOURCES AGENCY

EDMUND G. BROWN, JR., Governor

CALIFORNIA COASTAL COMMISSION

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

Takings Information

In some cases, additional application information is needed regarding an applicant's investment-backed expectation (including, but not limited to, cases where development is proposed in environmentally sensitive habitat areas (such as coastal dunes and wetlands), other highly sensitive areas (such as the critical viewshed in Big Sur), high hazard areas, etc.

Background

If an applicant for a coastal development permit can demonstrate that he or she has a sufficient real property interest in the property to allow the proposed project, and that denial of the proposed project based on application of Coastal Act policies would deprive his or her property of all economically viable use, some development may be allowed even where a Coastal Act policy may otherwise prohibit it, unless the project would constitute a nuisance under State Law. A specific development proposal may still be denied, however, if a more modest alternative proposal could be approvable, and thus assure the property owner of some economically viable use. Any development approved pursuant to this provision must conform to all other applicable Coastal Act requirements.

Information Needed

Since the Coastal Commission must analyze whether its action in denying a permit application would constitute a taking, in order to comply with Section 30010 of the Coastal Act and the California and United States Constitutions, the application filing requirements shall include information about the nature of the applicants' property interest. When an application involves property in which development could potentially be completely prohibited (for example, because the property contains environmentally sensitive habitat areas, is located in the critical viewshed, is subject to coastal hazards, etc.), the applicant shall submit the following information as part of their coastal development permit application:

1. Date the applicant purchased or otherwise acquired the property, and from whom.
2. The purchase price paid by the applicant for the property.
3. The fair market value of the property at the time the applicant acquired it. Describe the basis upon which the fair market value is derived, including any appraisals done at the time.
4. Changes to general plan, zoning or similar land use designations applicable to the subject property since the time of purchase of the property. If so, identify the particular designation(s) and applicable change(s).
5. At the time the applicant purchased the property, or at any subsequent time, has the property been subject to any development restriction(s) (for example, restrictive covenants, open space easements, etc.), other than the land use designations referred to in question (4) above?

Attachment 1

6. Any changes in the size or use of the property since the time the applicant purchased it. If so identify the nature of the change, the circumstance and the relevant date(s).

7. If the applicant has sold or leased a portion of, or interest in, the property since the time of purchase, indicate the relevant date(s), sales price(s), rent assessed, and nature of the portion of interest sold or leased.

8. Is the applicant aware of any title report, litigation guarantee or similar document prepared in connection with all or a portion of the property? If so, provide a copy of each such document, together with a statement of when the document was prepared and for what purpose (e.g., refinancing, sale, purchase, etc.).

9. Has the applicant solicited or received any offers to buy all or a portion of the property since the time of purchase? If so, provide the approximate date of the offer and the offered price.

10. Identify, on an annualized basis for the last five calendar years, the applicant's costs associated with ownership of the property. These costs should include, but not necessarily be limited to, the following:

    a. property taxes

    b. property assessments

    c. debt services, including mortgage and interest costs; and

    d. operation and management costs;

11. Apart from any rent received from leasing all or a portion of the property (see question #7, above), does the applicant's current or past use of the property generate any income? If the answer is yes, list on an annualized basis for the past five calendar years the amount of generated income and a description of the use(s) that generates or has generated such income.

Attachment 2

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

Re: Alleged Underground Regulation
From: Richard S. Kohn, Petitioner
Date: June 3, 2015

Identifying Information:

Richard S. Kohn
5 Ahab Drive
Muir Beach, CA 94965
(415)383-8220
brendakohn@aol.com

Introduction and Summary

This petition challenges a written and unwritten standard of general application of the California Coastal Commission (hereinafter the "Agency") that implements or interprets Public Resources Code Sec. 30010 declaring that private property may not be taken without payment of just compensation. The Agency's rule, which it refers to as the "takings avoidance criteria", is a classic example of an underground regulation that has never been vetted under the APA. The practical effect of the rule is to undermine the enforcement of the Local Coastal Programs (LCPs) that govern permitted development in the coastal zone throughout the state. By evading the requirements of the APA, the Agency has excluded the public from knowledge of, or meaningful participation in opposing, its interpretation.

The statute and the Agency's Interpretation

Section 30010 of the Public Resources Code (The Coastal Act) provides:

> "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing authority, or local government acting pursuant to this division to exercise their power to grant or deny a permit a manner which will take or damage private property for public uses, 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."[1]

[1] The federal Constitution states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. 5th Amend. The California Constitution provides: "private property may be taken or damaged for public use only when just compensation...has first been paid to, or into the court for, the owner." Cal. Const. Art. 1, sec.19.

Attachment 2

In *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602, 617-618, the Court of Appeals rejected an argument that Section 30010 gave local government a mandate to interpret regulations in a manner so as to avoid a potential takings claim. The court said:

> "The county relies on section 30010, which expresses a legislative intent that the Coastal Act *not* grant the Commission or any county the '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 therefor....' However, that does not support the anticipatory sort of takings balancing advocated by the County. The section appears designed to foreclose any claim that the Coastal Act authorizes takings *without compensation*, a construction which would leave the Act open to a facial challenge, (citations omitted) it does not ask the Commission to balance takings concerns in ESHA decisions." (emphasis in original)

Despite that clear ruling in a case in which it was the defendant, the Agency has adopted a *sub rosa* interpretation to implement Section 30010 directly at odds with the court's holding. In *Application of Anthony Wolcott,* No. A-3-SLO-98-061 (3/26/2015) a case arising in San Luis Obispo County, the Commission Staff Report describes the policy as follows:

> "In situations in which the LCP requires denial of a project, the Commission typically determines whether that denial would result in an unconstitutional taking of private property without just compensation. If denial would likely result in an unconstitutional taking, then the Commission may interpret the LCP in a manner that would avoid that result. Commission Staff Report "Summary of Staff Recommendation" p. 2. **EXHIBIT A.**

In Section H captioned "Takings Analysis" the Staff Report states:

> "In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions 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 the Act's regulations. Coastal Act Section 30010 provides:"[text of statute omitted]

"Although the judiciary will be the final arbiter on constitutional takings issues, the Coastal Act imposes on the Commission the statutory 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 Section 30010. If the Commission determines that its action could constitute a taking, then the Commission could also find that the application of Section 30010 would require it to approve some development. In this latter situation, the Commission could propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some reasonable amount of development." Staff Report Sec. H "Takings Analysis" p. 28-29 **EXHIBIT A.**

Further evidence that the Agency has adopted its interpretation as a rule or standard of general application is found in an Addendum to the Commission Staff's comments in support of a provision proposed by the County of Marin as an amendment to its Local Coastal Program.[2] The county's proposed language is attached hereto as **EXHIBIT B.** In reply to several comments opposing this provision, the Addendum states:

"Criteria to Avoid a Takings'

Several public comments assert that criteria to avoid a takings should not be inserted into the LCP because neither the Commission nor the local government can adjudicate a takings claim and therefore *deviation from otherwise applicable LCP standards* should not be authorized in order to avoid a takings. The Commission has approved numerous LCPs that implement the mandate of Coastal Act Section 30010, directing that the Coastal Act shall not be construed as authorizing neither the Commission nor the local government to exercise their power to grant or deny a permit in a manner that will 'take private property for public use without the payment of just compensation.' *The Commission itself has a longstanding practice of applying the Coastal Act, on a case by case*

[2] Under the California Coastal Act, each county prepares a Local Coastal Program (LCP). The LCP consists of a Land Use Plan (LUP) and an Implementation Plan (IP). The LUP contains the policies concerning development and the IP contains the more specific regulations needed to enforce the policies. Marin County is in the process of amending its LCP. Any amendments must be certified by the Coastal Commission before they become effective. Both the County and the Coastal Commission (within the scope of its appellate jurisdiction) enforce LCP provisions. At a hearing before the Coastal Commission on April 16, the County withdrew its IP and rescheduled it for November. However, the Commission Staff's approval of the proposed regulation reflects its own interpretation of Section 30010.

basis, in a manner consistent with Section 30010 if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking. This practice is both reasonable and entitled to great weight. To do otherwise, regardless of the seriousness of a particular takings risk, would subject the Commission, and a local government implementing its LCP, to the risk of the permit action being overturned, liability for takings damages, and the payment of attorney's fees.

In addition, although a local government is bound by Coastal Act Section 30010 whether or not takings avoidance criteria are set forth in a LCP, the addition of such criteria serves to provide all interested persons with a more systematic approach to evaluate whether there is substantial evidence of a takings risk and decreases the possibility of variability in implementation. Therefore, the Commission finds that the proposed takings avoidance criteria in IP Section 22.70.180, as modified, will assist the County in more effectively carrying out the provisions of its LCP consistent with the directives of Coastal Act Section 30010."

LCP-2-MAR-13-0224-1 Part B (Marin Implementation Plan Update, Addendum, p. 6.(Emphasis added) **EXHIBIT C.**[3]

In addition, at the Coastal Commission hearing on April 16, 2015 to consider Marin County's proposed IP, Chief Counsel Chris Pederson made the following statement: "As the commissioners are aware, the Commission has a long standing practice of, in situations where a potential denial raises takings concerns, of evaluating whether or not the Commission should approve a project in order to avoid a taking." Coastal Commission Archive Video website for the April 16, 2015 hearing in LCP-2-MAR-13-0224-1 Part B (Marin IP Update), 2:52:06.

And finally, attached as **Exhibit F** hereto is an official release[4] by the Coastal Commission entitled "Takings Information" laying out the Commission's policy in detail. Under the subheading "Background", it states:

> "If an applicant for a coastal development permit can demonstrate that he or she has a sufficient real property interest in the property to allow the proposed project, and that denial of the proposed project based on application of Coastal Act policies would deprive his or her property of all economically viable use, some development may be

[3] A comprehensive rebuttal to this statement is found in my letters dated April 16, 2015 and April 25, 2015, attached hereto as **EXHIBITS D and E.**

[4] The document is on the letterhead of the California Coastal Commission and bears the Great Seal of the State of California and the name of the current Governor, Edmund G. Brown, Jr.

> allowed even where a Coastal Act policy may otherwise prohibit it, unless the project would constitute a nuisance under state law."

Under the subhead "Information Needed", the document states in part:

> "Since the Coastal Commission must analyze whether its action in denying a permit application would constitute a taking, in order to comply with Section 30010 of the Coastal Act and the California and United States Constitutions, the application filing requirements shall include information about the nature of the applicants' property interest. When an application involves property in which development could potentially be completely prohibited..., the applicant shall submit the following information as part of their coastal development permit application:" [Here follows eleven categories of documents]

Whether characterized as a guideline, criterion, instruction, order, standard of general application, or rule, It is apparent that the Agency's interpretation of Section 30010 comes within the parameters of Government Code Section 11340.5(a) which applies whenever an agency seeks to "issue, utilize, enforce or attempt to enforce" one of the above categories. It is similarly clear that the interpretation has been adopted by the agency in order to *implement, interpret or make specific* section 30010 to govern its procedure, thereby bringing it within the definition of "regulation" in Government Code Section 11342,600.

Argument

With respect to APA compliance "the manner of avoidance takes many forms...but they can all be briefly described as 'house rules of the agency'."*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205 quoting First Report of the Senate Interim Committee on Administrative Regulations (1955). Notwithstanding the clear ruling in *Sierra Club* rejecting the notion that the Agency is authorized by Section 30010 to balance regulatory enforcement against potential taking claims, the Agency went underground.

In an effort to obtain written evidence of the policy, the undersigned filed a Public Records Act Request dated May 7, 2015 for all documents concerning the Agency's potential takings evaluation process, including but not limited to "handbooks, manuals, instructions, LCPs, guidelines and guidances." **EXHIBIT G.** In reply, the agency stated that it "has no non- exempt records responsive to this request." The Agency cited attorney-client correspondence as being exempt. **EXHIBIT H.**

Inexplicably, the Agency did not produce the "takings Information" bulletin described above although it was plainly covered by the first category of documents requested.[5]

It is readily apparent from the sources discussed above that the Commission has adopted a rule or general standard by which to implement Section 30010. The APA applies to both written and unwritten standards of general application. See, *California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 106; *Roth v. Department of Veterans Affairs*, 110 Cal.App.3d 622 (unwritten late charges).

Furthermore, as stated in its reply to the Public Records Act request, the Agency has no database or any means by which to track how its policy is being applied by its statewide offices. So it has put in motion a statewide process over which it has no supervisory control.[6] Whether intentional or not, it appears that the Agency has gone to great lengths not to leave a paper trail accessible to the public.

To be deemed an underground regulation, the policy must meet two requirements: (1) the Agency must intend it to apply generally rather than in a specific case; and (2) the agency must adopt it to implement, interpret or make specific the law enforced by the agency. *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1381.

With respect to the first requirement, the Agency's policy applies to any and all applications for development permits within its jurisdiction where strict compliance with the LCP would require the denial of the permit. This automatically triggers an inquiry and calls for a judgment to be made concerning whether a takings claim could be asserted. To answer that question requires an evaluation of the complex of factors that the courts have developed for the purpose of determining whether the Agency's action would result in a compensable taking. Depending upon the outcome of that analysis, the Agency may deviate from otherwise applicable LCP requirements and grant a permit in order to avoid a potential takings claim.

In the April 16 Addendum to the LCP provision discussed above, the Agency refers to its "longstanding practice of applying the Coastal Act, *on a case by case basis*, in a manner consistent with Section 30010 if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking." (emphasis added) To be sure, "interpretations that arise in the course of case-specific adjudication are not regulations." *Tidewater Marine Western Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571. But that is not what is happening here, Every case in which a permit would normally be denied is a potential candidate for application of the "takings avoidance criteria." The case does not give rise to the policy; each case is reviewed

[5] The undersigned learned about this document from watching the video of the April 16, 2015 hearing in a case captioned " Application of Anthony Wolcott", A-3-SLO-98-061 (San Luis Obispo County). Mr. Wolcott's representative Jeff Edwards made reference to a takings questionnaire and "packet" sent by the Coastal Commission. Video Archive 7:11:31. A search of the agenda archives uncovered the document. P. 18-19.

[6] The Coastal Commission has six district offices.

according to the policy. "A rule applies generally so long as it declares how a certain class of cases will be decided." Ibid.; *Taye v. Coye* (1994)29 Cal.App.4th1339, 1345 ("the method was a regulation because it was a standard of general application applied in every Medi-Cal case reviewed by the Department audit teams and used to determine the amount of the overpayment.")

Furthermore, the "Takings Information" document is the type of bulletin that the courts have held to be regulations. *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490,501 (informational "bulletin" defining terms of art and establishing rebuttable presumption); *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583, 588 (policy memorandum declaring that work performed outside one's job classification does not count toward qualifying for a promotion).

There can be little doubt that the second prong of the test is met. "Anything regulatory is a regulation whether or not so labeled by the agency." *State Water Resources Control Board v. Office of Administrative Law* 12 Cal.App.4th 697, 703. Assuming that the Agency's interpretation of Section 30010 is valid (an assertion we dispute given *Sierra Club*), its "takings avoidance criteria" is plainly intended to interpret and implement the statute. *Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 146 Cal.App.4th 1457, 1470. Nothing in Section 30010 itself addresses the procedure by which state or local agencies should go about assessing such claims. Nothing in Section 30010 makes "substantial evidence" the standard by which such claims are to be measured, as stated in the Addendum quoted above. There is no questionnaire such as that which is set forth in the "Takings Information" document. The policy embellishes the statute and therefore requires compliance with the APA. *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62.

The California Coastal Commission Is Not Exempt

The Agency is not exempt from APA compliance pursuant to Government Code section 11340.9.

Obviously, no claim could be made that the Agency's rule is exempt as an internal management rule [Government Code sec. 11340.9(d)] because its impact extends far beyond the internal affairs of the Agency. *Armistead v. State Personnel Board* (22 Cal.3d 198, 203-04;*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436.

Nor, given *Sierra Club v. California Coastal Commission*, could the Agency claim that its policy is the "only legally tenable interpretation of a provision of law", pursuant to Section 11340.9(f). Furthermore, as discussed below, controlling decisional law has held that it is beyond the competence of administrative agencies to decide constitutional takings claims.

Even assuming that the Agency's interpretation of Section 30010 were valid, its *application* would not be the only alternative available. The Agency has given its blessing to the County's version of a regulation to enforce Section 30010. A comparison

of the two shows significant differences. For example, the County version applies to contiguous parcels and does not distinguish between total and partial takings with regard to the questions that must be answered. It necessarily follows that the Agency's interpretation is not the "only legally tenable interpretation." *See, Tidewater Marine Western, Inc. v. Bradshaw,* 14 Cal.4th at 574 (""...if the DLSE's interpretation of the IWC wage orders were the only reasonable interpretation, then the DLSE would not need to state the interpretation in a policy manual in order to 'achieve some measure of uniformity from one office to the next'").

Also, the provisions of the Villaraigosa-Keeley Act cited in Government Code Section 11361 are inapplicable to the subject matter of this petition. Rather than anticipate further any exemption the Agency may assert, if the Agency claims an exemption under any provision of section 11340.9 or elsewhere in the APA, I would appreciate the opportunity to respond.

The Public interest

There is a strong public interest in promptly resolving the question of whether the Agency's potential takings policy is an underground regulation. Implementation of the policy reflects a serious abuse of authority. As stated above, in *Sierra Club v. California Coastal Commission*, the court held that Section 30010 did not authorize the Commission to balance takings claims against enforcement of regulations. Subsequently, in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the California Supreme Court held that administrative agencies are not competent to decide constitutional takings claims: takings claims can only be decided by the courts See also, *Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158, cited with approval in *Hensler.*

The California legislature has created a procedure for how constitutional takings claims are to be adjudicated. The judicial remedies employed include filing an administrative mandamus action by the applicant coupled with or followed by an inverse condemnation case. See *Hensler v. City of Glendale,* 8 Cal.4th at 13*; Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263. Takings claims involve the application of complex legal standards and the development of an evidentiary record with full procedural protections. The Agency's "takings avoidance criteria" undercuts that procedure and insulates takings issues from judicial review: If the Agency grants a permit in order to avoid a takings claim, the applicant for the permit has no incentive to file a mandamus action to determine whether a compensable taking has *actually occurred.* Paradoxically, it puts the Agency in a position where it is acting as the applicant's surrogate, rather than its adversary. The policy appears to be a calculated effort to circumvent *Sierra Club* and *Hensler* while avoiding the public scrutiny that would attend regulatory approval under the APA.[7]

[7] Attached hereto is a letter sent to the Coastal Commission dated May 20, 2015 bringing the APA issue to its attention. **Exhibit I.**

In summary, the "takings avoidance criteria" insulates the Agency's decision from judicial review, negates the normal procedure for raising and deciding takings issues, violates the separation of powers and the principle of stare decisis and undermines land use regulation in the coastal zone.

Conclusion

As the court said in *State Water Resources Control Board v. Office of Administrative Law,* 12 Cal.App.4th at 702, "if [an agency rule] looks like a regulation, reads like a regulation, and acts like a regulation , it will be treated as a regulation whether or not the agency in question so labeled it." The "takings avoidance criteria" is an underground regulation because it is a standard of general applicability and interprets and implements Section 30010. As such, it must undergo rigorous scrutiny pursuant to the APA.

I certify that on June 3, 2015 I mailed a copy of this petition and exhibits by first class postage prepaid and addressed to:

Chris Pederson
Chief Counsel
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105
(415) 904-5260

Respectfully submitted,

Richard S. Kohn

LIST OF EXHIBITS

A. Staff Report Application of Anthony Wolcott for CDP, No. A-3-SLO-98-061 3/26/15
B. County of Marin proposed IP Sec. 22.70.180 as amended July 30, 2013
C. Staff Report Addendum for Th7a Marin County LCP Amendment No. LCP-2-MAR-13-0224-1 (Part B) (Marin Implementation Plan Update)
D. Letter from RICHARD S. KOHN to California Coastal Commission dated April 16, 2015.
E. Letter to Charles Lester from Richard Kohn dated April 25, 2015.
F. California Coastal Commission "Takings Information" Bulletin
G. Public Records Act Request to California Coastal Commission dated April 25, 2015
H. California Coastal Commission Reply to Public Records Act Request dated May 7, 2015
I. Letter to Charles Lester, Executive Director, California Coastal Commission, from Richard Kohn dated May 20, 2015 re: APA

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Filed:	7/8/1998
Action Deadline:	None
Staff:	Katie Butler
Staff Report:	3/26/2015
Hearing Date:	4/16/2015

STAFF REPORT: DE NOVO HEARING

Application Number:	**A-3-SLO-98-061**
Applicant:	**Anthony Wolcott**
Project Location:	Undeveloped end of 10th Street, at 1111 and 1113 10th Street, along Morro Bay in the unincorporated community of Los Osos, San Luis Obispo County (APNs 038-052-001 and 038-052-026)
Project Description:	Construction of two single-family residences, shared access driveway, and drainage improvements.
Staff Recommendation:	Denial

SUMMARY OF STAFF RECOMMENDATION

The Applicant proposes to construct two approximately 2,000 to 3,000 square-foot single family residences with a shared driveway on two vacant and undeveloped parcels. The proposed project is located at the northern terminus of 10th Street in the unincorporated community of Los Osos, in San Luis Obispo County, immediately adjacent to the Morro Bay National Estuary. San Luis Obispo County approved the proposed project on May 12, 1998, and that approval was appealed to the Commission. On April 14, 1999, the Commission found that the County's approval raised a substantial LCP conformance issue, primarily in terms of sensitive habitat, and took jurisdiction over the coastal development permit (CDP) application. Since 1999, staff has corresponded multiple times with the Applicant in order to obtain information necessary for de novo review, but the Applicant did not provide the requested information and thus the item was placed in suspended status awaiting the time when the Applicant again wished to pursue the

application. Ultimately, in 2011, as part of an effort to clear items that were no longer being pursued, staff requested that the Applicant withdraw the application due to 12 years of inactivity. At that time, the Applicant requested that the Commission continue to process the application, and staff has been working with the Applicant, San Luis Obispo County, and other applicable agencies (Regional Water Quality Control Board (RWQCB) and U.S. Fish and Wildlife Service) since that time to obtain the necessary information to bring the application to a Commission hearing. Thus, the CDP application is now before the Commission for consideration and action.

The project is inconsistent with the LCP's wastewater and environmentally sensitive habitat area (ESHA) policies. With respect to wastewater, the project site lies within an area that is not yet served by a sewer system, and within a longstanding septic system prohibition zone established by the RWQCB due to groundwater contamination issues that have plagued the Los Osos basin for decades as a result of individual septic systems. Thus, the project does not have access to adequate wastewater services, and cannot be approved. Although the County is currently constructing a community sewer system for the Los Osos area, that system is not yet complete, nor have the conditions been met to allow any service. In fact, the CDP approved by the Commission for the sewer system included conditions that require the County to update the LCP and prepare a communitywide Habitat Conservation Plan (HCP) to address allowable development on undeveloped lots within Los Osos prior to any sewer connections. An important part of the LCP update is to identify which properties lie within the developable urban area and thus are going to be allowed to connect to the sewer system ultimately. The Applicant's property is in an undeveloped ESHA area bordering Morro Bay, and it is not clear at this time whether the Applicant's property will be allowed to connect, and this will not be decided until the LCP is updated. The County is currently working on the LCP update, but it is not clear when it will be complete, and it is not clear when it will be acted on locally and then ultimately by the Commission.[1] In short, the Applicant currently has no means of providing wastewater service, and thus the project is not approvable under the LCP.

In terms of ESHA, the project site is also almost entirely comprised of wetland and related resources associated with the Morro Bay National Estuary, and it is mapped in the LCP as a Sensitive Resource Area (i.e., ESHA per this LCP). The Commission's ecologist has evaluated the site, and concluded that the entire site is ESHA. The LCP prohibits non-resource dependent development in this ESHA area, and thus the project is inconsistent with the LCP on this point as well.

In situations in which the LCP requires denial of a project, the Commission typically determines whether that denial would result in an unconstitutional taking of private property without just compensation. If denial would likely result in an unconstitutional taking, then the Commission may interpret the LCP in a manner that would avoid that result. In this situation, while the parcels in question are entirely ESHA, a takings claim related to a denial is not yet ripe because there is currently no allowable wastewater service for the site, necessitating project denial at this time. Because the takings claim is not ripe, the issue of whether project denial based on ESHA would effectuate a taking has not been evaluated.

[1] The County indicates that allowable hookups are not likely to occur until at least 2020.

In sum, staff recommends that the Commission deny the CDP for the project. The motion and resolution to implement this recommendation is found on page 4.

TABLE OF CONTENTS

Exh. A-3

I. MOTION AND RESOLUTION

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 of this 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-98-061, and I recommend a no vote.*

Resolution to Deny CDP: *The Commission hereby denies Coastal Development Permit Number A-3-SLO-98-061 and adopts the findings set forth below on grounds that the development will not be in conformity with San Luis Obispo County Local Coastal Program policies and Coastal Act 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. FINDINGS AND DECLARATIONS

In this de novo review of the proposed CDP application, the standard of review is the San Luis Obispo County certified LCP and, because the project is located between the first public road and the sea, the public access and recreation policies of the Coastal Act.

A. PROJECT LOCATION AND SITE DESCRIPTION

The project site is located in the northern portion of the unincorporated community of Los Osos/Baywood Park, in San Luis Obispo County, immediately adjacent to the Morro Bay National Estuary. The site is located at the northern terminus of 10th Street and is surrounded by Morro Bay National Estuary to the north and east, single family residences to the south and southwest, and the El Moro Elfin Forest open space area to the northeast, approximately half of which is part of Morro Bay State Park. The project site consists of APN 038-052-001 (Lot 33, 1111 10th Street) which is 9,600 square feet (0.2 acre) in size and APN 038-052-026 (Lots 1 and 32, 1113 10th Street) which is 16,800 square feet (0.38 acre) in size. A portion of the proposed common driveway would also be located within the 16,000-square foot (0.4-acre) County right-of-way adjacent to the property at the end of 10th Street.

All of the Applicant's property as well as the County's right-of-way property is undeveloped, and is comprised of woody vegetation except for the shoreline frontage, which extends out into the wetland marsh and open water of Morro Bay. The woody vegetation is primarily riparian habitat consisting of willows and other riparian species, as well as pygmy oak woodland. A portion of the middle of the site is coastal scrub habitat. The site slopes moderately from southeast in the County right-of-way to the northwest wetland area.

The site is located within the urban services line (USL) of the Estero Planning Area of the San

Luis Obispo County Local Coastal Program (LCP) Land Use Plan (LUP) and is designated Single Family Residential. It is also within a sensitive resource area (SRA) and archeologically sensitive area as shown on the LCP combining designations map. See project location maps and site photos in **Exhibit 1 and Exhibit 2**.

B. PROJECT DESCRIPTION

The proposed project consists of two approximately 2,000 to 3,000 square-foot single family residences on two undeveloped parcels at 1111 and 1113 10th Street with a common driveway on the undeveloped County right-of-way extending from the paved section of 10th Street (see **Exhibit 3**).[2] The residence at 1111 10th Street would be single level with a height of 14 feet above average finished grade and would require 69 cubic yards of fill. The residence at 1113 10th Street would be split level with a height of 14 feet above average finished grade and would require approximately 167 cubic yards of fill. Both residences would be constructed on pilings, with the exception of the garages, which would be constructed on slab-on-grade foundations. The shared driveway would range from 12 to 18 feet in width with a total length of 250 feet from the currently paved section of 10th Street to the westernmost residence, and would be comprised of both asphalt and pervious interlocking concrete pavers. Approximately 110 feet of the driveway length would be located in the public right-of-way at the end of 10th Street, resulting in approximately 5,400 square feet of disturbance within the public right-of-way. The total disturbed area for the entire project would be approximately 20,873 square feet, or just under one half acre.

The project would include drainage elements to address runoff from the roof surfaces of the residences, runoff from an existing County drainage facility to the east of the site, and runoff from 10th Street and the proposed driveway. Such elements include an approximately 250-foot long rock-lined drainage swale and rip rap energy dissipator at the southwestern corner of the property, where water would then flow freely into the marsh area associated with the Morro Bay National Estuary. No water treatment mechanisms, such as an oil and grease separator and/or sedimentation basin, are proposed for site runoff. The County's original approval included a requirement to connect the residences to the future Los Osos community sewer or obtain approval from the Regional Water Quality Control Board for an onsite septic system. The Applicant intends to connect the residences to the future sewer system.

See **Exhibit 3** for the proposed project plans.

C. PROJECT HISTORY

The current Applicant, Anthony Wolcott, applied for two similar houses in the late 1980s. Ultimately, the Coastal Commission approved two CDP applications for the project site on July 14, 1988. CDP application number 4-87-115 involved a 2,841-square foot residence at 1113 10th

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[2] The project approved by the San Luis Obispo County Board of Supervisors on May 12, 1998 consisted of two similarly sized residences that were sited approximately 50-75 feet to the southeast of the proposed project in order to be set back from the wetland area of the site (although some wetland encroachment would still have occurred). The County approved a variance to the LCP's minimum 25-foot wetland setback to allow development in this setback area as well as in the wetland itself. As proposed now, the residences would have no setback from wetland, and in fact would be located in the wetland itself.

Because of the habitat composition of the site, no alternative project configuration or design(s) exists that would minimize disruption of habitat for these species.

In sum, the project site is a highly sensitive complex coastal ecosystem that may provide habitat for a number of protected plant and animal species. The LCP limits development within ESHA to resource-dependent uses and prohibits fill of wetlands for residential uses, and because almost the entire site is ESHA, the LCP requires the Commission to deny all residential development proposed on the Applicant's parcels.

Conclusion

The proposed project is located in and adjacent to ESHA, including high value wetland and pygmy oak habitat that is contiguous with the adjacent Morro Bay National Estuary and the protected El Moro Elfin Forest. The project proposes development that is prohibited in ESHA and that would remove ESHA and adversely affect ESHA not removed, including off-site ESHA, inconsistent with the LCP. Even if the proposed project were otherwise approvable, it does not meet habitat setback or species protection requirements. Therefore, the proposed project is inconsistent with the LCP's ESHA and wetland and terrestrial habitat policies, and cannot be approved consistent with the LCP and would require a "takings" override, which, because of the denial on wastewater grounds, is not necessary at this time.

F. Other Issues

Typically, the proposed project would need to be evaluated for consistency with the LCP's policies and standards related to public access, visual resources, hazards, landform alteration, hydrology and water quality, cultural resources, parking and traffic, land use and zoning, etc. However, because the project is being denied based on a lack of adequate wastewater treatment and ESHA and public access inconsistencies, these issues will not be evaluated in this de novo review.

G. LCP Consistency Conclusion

As discussed above, the proposed project is inconsistent with the LCP's policies and standards that require that adequate public services, namely wastewater service, be available to serve new development and that this type of development assure no adverse impacts to ESHA and wetlands. Thus, the project is denied.

H. Takings Analysis

In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions 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 the Act's regulations. Coastal Act Section 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 judiciary will be the final arbiteron constitutional takings issues, the Coastal Act imposes on the Commission the statutory 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 Section 30010. If the Commission determines that its action could constitute a taking, then the Commission could also find that application of Section 30010 would require it to approve some development. In this latter situation, the Commission could 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 Section 30010, its denial of the proposed development on the Applicant's property could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not, because the takings claim is not yet ripe.

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."[20] 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." Despite the slightly different wordings, the two "takings clauses" are construed congruently, and California courts have analyzed takings claims under decisions of both state and federal courts. (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664.) The "damaging private property" clause in the California Constitution is generally not implicated by takings cases, and is not relevant to the current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The Unites 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,*

[20] 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).

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, 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."[21]).

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 reflects 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 are reviewed for denial of the proposed project.

The Commission's denial of the proposed project likely would not result in a regulatory taking.

As analyzed above, application of Coastal Plan Public Works Policy 1, Estero Area Plan Chapters 3 and 4 policies, and CZLUO 23.04.430 require denial of the proposed development on

[21] 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).

the grounds that the site is located in a RWQCB-mandated onsite septic prohibition zone and Los Osos lacks a community wastewater treatment system at the present time. Thus, it could be argued that the regulations result 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 Coastal Plan Public Works Policy 1, Estero Area Plan Chapters 3 and 4 policies, and CZLUO 23.04.430 have the effect of a moratorium on new development in Los Osos that requires new wastewater treatment. 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, Coastal Plan Public Works Policy 1, Estero Area Plan Chapters 3 and 4 policies, and CZLUO Section 23.04.430 have the effect of a temporary prohibition on economic use, and as soon as the community wastewater treatment system is operational and the additional required planning steps (Estero Area Plan LCP amendment and HCP) are completed, the prohibition would be lifted. Moreover, these LCP policies and CZLUO regulation are 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. It also ensures the protection of significant resources, such as Morro Bay water quality, and is intended to protect the groundwater aquifer from adverse impacts such as nitrate contamination.

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. 4th 1068 (*Pratt v. CCC*). In *Pratt*, the plaintiff argued that the Coastal Commission's decision to deny a CDP based on lack of water, due to the requirements of CZLUO Section 23.04.430(a) was an unconstitutional taking. The Court of Appeal upheld the Commission's denial of the CDP and found that it was not an unconstitutional taking. It stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) that the setting of 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 the plaintiff-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. As in *Pratt*, in this case it is the lack of wastewater service in Los Osos that 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 Coastal Plan Public Works Policy 1, Estero Area Plan Chapters 3 and 4 policies, and CZLUO 23.04.430, would result in an unconstitutional taking. Although the regulations' effect is a *de facto* moratorium on new development at this time, this effect of the regulations is temporary in nature and caused by a lack of available wastewater treatment for undeveloped properties.

I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

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 CDP 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. San Luis Obispo County Local Coastal Program, originally certified February 1988
2. San Luis Obispo County file records for D960345V, D880295D, D960346V, and D880338D
3. San Luis Obispo County, Environmental Division, Department of Planning and Building, *Final EIR for Farbstein Development Plans ED89-201 (D880338D) and ED89-220 (D880295D), State Clearinghouse No. 92031011*, April 1997.
4. Coastal Commission files for CDP Applications 4-87-115 and 4-87-117
5. Coastal Commission CDP file for the Los Osos Wastewater Project (CDP A-3-SLO-09-055/069)
6. Los Osos Community Services District, Golden State Water Company, and S&T Mutual Water Company, *Updated Basin Plan for the Los Osos Groundwater Basin*, January 2015.
7. Ecological Assets Management, LLC. *Morro Shoulderband Snail Protocol Survey Report for 1111 (APN 038-052-001) and 1113 (APN 038-052-026) 10th Street, Los Osos, California.* March 4, 2015.
8. San Luis Obispo County Code of Ordinances, Title 19 (Buildings and Construction)
9. San Luis Obispo County Planning & Building. *Public Review Draft, Los Osos Community Plan.* January 30, 2015.

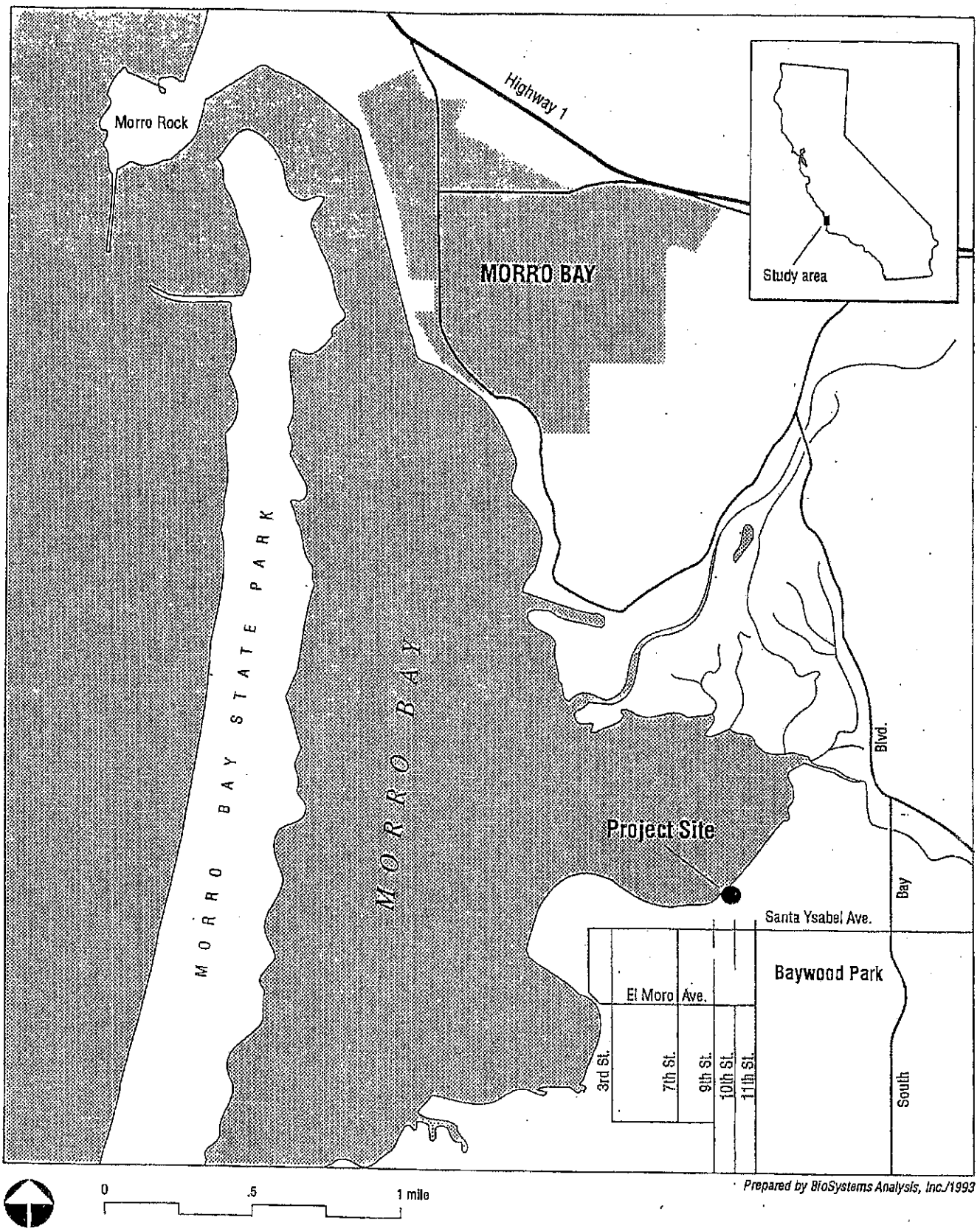

Exhibit 1
A-3-SLO-98-061
1 of 1

Figure 3-1. Location map, Farbstein development project, San Luis Obispo County, California.

Wolcott Site
El Moro
Elfin Forest
County ROW
Project Site
Morro Bay
National Estuary
100 ft
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Exh. A-13

MARIN COUNTY
LOCAL COASTAL PROGRAM

Development Code ~~Amendments~~

Board of Supervisors Adopted ~~Draft~~

July 30, 2013

~~Important Note:~~
~~These amendments are not yet certified by the California Coastal Commission~~

Marin County Board of Supervisors

Judy Arnold, President, District #5
Kathrin Sears, Vice-President, District #3
Katie Rice, 2nd Vice President, District #2
Susan L. Adams, District #1
Steve Kinsey, District #4

Prepared by the
Marin County Community Development Agency

Brian C. Crawford, Director

This report is funded in part with qualified outer continental shelf oil and gas revenues by the Coastal Impact Assistance Program, Bureau of Ocean Energy Management, Regulation, and Enforcement, U.S. Department of the Interior.

Exh. B-1

A. Any person who performs or undertakes development in violation of the LCP or inconsistent with any coastal permit previously issued may, in addition to any other penalties, be civilly liable in accordance with the provisions of Public Resources Code section 30820.

B. In addition to all other available remedies, the County may seek to enforce the provisions of the LCP and the Coastal Act pursuant to the provisions of Public Resources Code section 30800-30822.

C. Development may only be undertaken on a legal lot.

D. No coastal development permit application (including all coastal permits, coastal permit exclusions and exemptions, and de minimis waivers) shall be approved unless all unpermitted development on the property affected by the application also is proposed to be removed or retained consistent with the requirements of the certified LCP, and the approval includes full resolution of violations associated with the property affected by the application.

22.70.180 – Potential Takings ~~Economic~~ Evaluation

If the application of the policies, standards or provisions of the Local Coastal Program ~~regarding use of property designated as Environmentally Sensitive Habitat Area (ESHA~~ to proposed development would ~~likely~~ potentially constitute a taking of private property, then ~~a use~~development that is not consistent with the ~~ESHA provisions of the~~ LCP ~~shall~~ may be allowed on the property to avoid a taking, provided such ~~use~~ development is as consistent as possible with all ~~other~~ applicable policies and is the minimum amount of development necessary to avoid a taking as determined through a takings evaluation, including an ~~economic~~ evaluation of the materials required to be provided by the applicant as set forth below. The applicant shall supplement their application materials to provide the required information and analysis as specified below.

A. Filing. The ~~economic~~ evaluation shall, at a minimum, include the entirety of all parcels that are geographically contiguous and held by the applicant in common ownership at the time of the application. All other nearby property owned by the Applicant may also be considered. Before any decision on a coastal development permit, the applicant shall provide the following information, unless the Director determines that one or more of the particular categories of information is not relevant to the analysis:

1. The date the applicant purchased or otherwise acquired the properties~~y~~, and from whom.
2. The purchase price paid by the applicant for the properties~~y~~.
3. The fair market value of the properties~~y~~ at the time the applicant acquired ~~it~~ them, describing the basis upon which the fair market value is derived, including any appraisals done at the time.
4. The general plan, zoning or similar land use designations applicable to the properties~~y~~ at the time the applicant acquired ~~it~~ them, as well as any changes to these designations that occurred after acquisition.
5. Any development restrictions or other restrictions on use, other than government regulatory restrictions described in subsection (4) ~~d~~ above, that applied to the properties~~y~~ at the time the applicant acquired ~~it~~ them, or which have been imposed

after acquisition.

6. Any change in the size of the propertiesy since the time the applicant acquired it them, including a discussion of the nature of the change, the circumstances and the relevant dates.
7. A discussion of whether the applicant has sold or leased a portion of, or interest in, the propertiesy since the time of purchase, indicating the relevant dates, sales prices, rents, and nature of the portion or interests in the propertiesy that were sold or leased.
8. Any title reports, litigation guarantees or similar documents in connection with all or a portion of the propertiesy of which the applicant is aware.
9. Any offers to buy all or a portion of the propertiesy which the applicant solicited or received, including the approximate date of the offers and offered price.
10. The applicant's costs associated with the ownership of the propertiesy, annualized for each of the last five (5) calendar years, including property taxes, property assessments, debt service costs (such as mortgage and interest costs), and operation and management costs.
11. Apart from any rents received from the leasing of all or a portion of the propertiesy, any income generated by the use of all or a portion of the propertiesy over the last five (5) calendar years. If there is any such income to report it should be listed on an annualized basis along with a description of the uses that generate or has generated such income.
12. Any additional information that the County requires to make the determination.

B. Evaluation. To evaluate whether application of the LCP a restriction would potentially result in a taking not provide an economically viable use of property as a result of the application of the policies and standards contained in the LCP regarding use of property designated as ESHA, an applicant shall provide information about coastal resources present on the propertiesy and/or affected by the application sufficient to determine whether all of the propertiesy, or which specific area of the propertiesy, is subject to the restriction on development, so that the scope and nature of development that could be allowed on any portions of the propertiesy that are not subject to the restriction can be determined.

Based upon this analysis, the least environmentally damaging feasible alternative shall be identified. Impacts to ESHA coastal resources that cannot be avoided through the implementation of siting and design alternatives shall be mitigated to the maximum extent feasible, with priority given to on---site mitigation. Off---site mitigation measures shall only be approved when it is not feasible to mitigate impacts on---site. Mitigation shall not substitute for implementation of the feasible project alternative that would avoid LCP inconsistencies, including adverse coastal resource impacts to ESHA.

C. Supplemental Findings for Approval of Coastal Development Permit. A Coastal Permit that allows a deviation from a policy or standard of the LCP to avoid a taking provide a reasonable economic use of the parcel as a whole may be approved or conditionally approved only if the appropriate governing body, either the Planning Commission or Board of Supervisors, makes the following supplemental findings in addition to the findings required in Section 22.70.070 (Required Findings):

1. Based on the economic information provided by the applicant, as well as any other relevant evidence, no use development consistent allowed by with the LCP policies, standards or and provisions would provide an economically viable use avoid a taking of the applicant's property.
2. The use proposed by the applicant is consistent with the applicable zoning.
3. The use and project design, siting, and size are the minimum necessary to avoid a

taking.

4. The project is the least environmentally damaging alternative and is consistent with all provisions of the certified LCP other than the provisions for which the exception(s) is(are) ~~requested~~ necessary to avoid a taking.
5. The development will not ~~be~~ result in a public nuisance. If it would be a public nuisance, the development shall be denied.

~~[BOS app. 10/2/2012]~~

22.70.190 – Land Divisions

This section shall provide standards for the issuance of coastal permits for land divisions. Land division is a type of development, defined to include subdivision (through parcel map, tract map, grant deed), lot line adjustments, redivisions, mergers, and certificates of compliance.

A. Certificates of Compliance:

1) For issuance of a certificate of compliance pursuant to Government Code section 66499.35 for a land division that occurred prior to the coastal permits being required (i.e., prior to February 1, 1973 for certain properties pursuant to the Coastal Initiative (Proposition 20) of 1972, and prior to January 1, 1977 otherwise under the Coastal Act of 1976), where the parcel was created in compliance with the law in effect at the time of its creation and the parcel has not been subsequently merged or otherwise altered, no coastal development permit is required.

2) For issuance of a certificate of compliance pursuant to Government Code section 66499.35 for a land division that occurred prior to coastal permits being required (i.e., prior to February 1, 1973 for certain properties pursuant to the Coastal Initiative (Proposition 20) of 1972, and prior to January 1, 1977 otherwise under the Coastal Act of 1976), where the parcel was not created in compliance with the law in effect at the time of its creation, or the parcel has subsequently been merged or altered, a coastal development permit that complies with the certified LCP (or the Coastal Act if located in the Coastal Commission's permitting jurisdiction) is required to legalize the parcel.

3) For issuance of a certificate of compliance pursuant to Government Code section 66499.35 for a land division that occurred after the effective date of the Coastal Act, a coastal development permit that complies with the certified LCP (or the Coastal Act if located in the Coastal Commission's permitting jurisdiction) is required to legalize the parcel.

B. Criteria for Land Divisions

1) Land divisions shall be prohibited if located outside of designated village limit boundaries and within an area found to have limited public service capacities (as specified by Section 22.64.140).

2) Land divisions shall be designed to minimize impacts on coastal resources. A land division shall not be approved if it creates a parcel that would not contain an identified building site that can be developed consistent with all policies of the certified LCP.

3) The minimum lot size in all land use designations shall not allow land divisions, except mergers and lot line adjustments, where the created parcel would be smaller than

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY
EDMUND G. BROWN JR., GOVERNOR

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Click here to go to original staff report

Th7a

Prepared April 15, 2015 (for April 16, 2015 hearing)

To: Coastal Commissioners and Interested Persons

From: Nancy Cave, District Manager
Kevin Kahn, District Supervisor

Subject: STAFF REPORT ADDENDUM for Th7a
Marin County Local Coastal Program Amendment Number LCP-2-MAR-13-0224-1 Part B (Marin Implementation Plan Update).

The purpose of this addendum is to supplement the recommended findings with additional clarification and to change some of the staff recommendation on particular suggested modifications, both as presented in the staff report dated prepared April 2, 2015. Specifically, this addendum supplements and makes minor changes to the staff recommended findings related to agriculture, hazards, visual resources, and coastal development permit (CDP) procedures. It also makes certain changes to the staff recommended suggested modifications, as shown below (where applicable, text in double underline format indicates additional text that is being suggested, and text in ~~double strikethrough~~ format indicates additional text suggested for deletion.

The findings below are hereby incorporated by reference into the relevant sections of the staff report dated April 2, 2015 and will appear as Commission findings if the staff recommendation is adopted by the Commission.

1. Additional response to comments
Insert the following in Section III.B.8 "Response to Public Comments" on page 89 of the Staff Report, after the sentence ending with ". . . even if the proposed development is development that is principally permitted or eligible for streamlined permit processing, including though local appeals.":

Agricultural Dwelling Units
County staff has expressed concern about the IP's agricultural dwelling provisions, claiming that the policies as modified will encourage farmers to sell their lots, break up their farms, and risk their agricultural enterprise in order to circumvent the IP's requirements and build additional dwellings. However, as explained in detail elsewhere in this staff report, staff does not believe that the IP's policies pertaining to agricultural dwelling units will encourage farmers to sell or divide their legal lots. First, because the IP requires 60 acre densities in order to build a

process for consideration of such minor development without a hearing, does not require that the local government determine in writing whether development is minor and therefore qualifies for a hearing waiver. Additionally, under both the statute and IP Section 22.70.030, a public hearing waiver can only be authorized if interested persons decline to request the otherwise required public hearing. If a public hearing for minor development is requested, the waiver procedure will not be utilized and the otherwise required public hearing will occur, as is specified by the Coastal Act.

Emergency Coastal Development Permit Issuance
Several public comments assert, based on Coastal Act Section 30624(c), that IP Section 22.70.140 impermissibly authorizes the Planning Director to issue an emergency CDP without that permit subsequently being agendized on the agenda of the governing body. The section cited by the public commenters, Section 30624(c), references a process unique to local governments issuing CDPs pursuant to Section 30600.5, a section of the Coastal Act governing the issuance of CDPs by local governments pursuant to a Commission-certified Land Use Plan and without an Implementation Plan. This unique processing situation is not applicable to Marin County, and the IP section addressing emergency CDPs, as suggested to be modified, is consistent with the Coastal Act.

Criteria To Avoid a Takings
Several public comments assert that criteria to avoid a takings should not be inserted into the LCP because neither the Commission nor the local government can adjudicate a takings claim and therefore deviation from otherwise applicable LCP standards should not be authorized in order to avoid a takings. The Commission has approved numerous LCPs that implement the mandate of Coastal Act Section 30010, directing that the Coastal Act shall not be construed as authorizing neither the Commission nor the local government to exercise their power to grant or deny a permit in a manner that will "take private property for public use without the payment of just compensation." The Commission itself has a longstanding practice of applying the Coastal Act, on a case by case basis, in a manner consistent with Section 30010 if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking. This practice is both reasonable and entitled to great weight. To do otherwise, regardless of the seriousness of a particular takings risk, would subject the Commission, and a local government implementing its LCP, to the risk of the permit action being overturned, liability for takings damages, and the payment of attorney's fees.

In addition, although a local government is bound by Coastal Act Section 30010 whether or not takings avoidance criteria are set forth in a LCP, the addition of such criteria serves to provide all interested persons with a more systematic approach to evaluate whether there is substantial evidence of a takings risk and decreases the possibility of variability in implementation. Therefore, the Commission finds that the proposed takings avoidance criteria in IP Section 22.70.180, as modified, will assist the County in more effectively carrying out the provisions of its LCP consistent with the directives of Coastal Act Section 30010.

Visual Resource Protection
Public comments have asserted that the IP's visual resource protection standards are insufficient since they simply cross-reference back to LUP policies. Specifically, they suggest that there be a

LCP-2-MAR-13-0224-1 Part B
(Marin IP Update)
Item No. TH7a
Richard Kohn
Opposed

April 16, 2015

5 Ahab Drive
Muir Beach, CA 94965

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: LCP-2-MAR-13-0224-1 Part B (Marin Implementation Plan Update) Addendum

Dear Commissioners,

On April 15, 2015, an addendum to the Staff Report on the implementation plan was posted. The Addendum's discussion of the "Criteria to Avoid a Taking" on page 6 is notable for the absence of any reference to the relevant California case law regarding its authority to engage in a takings analysis. It is particularly baffling given the fact that the Coastal Commission was a defendant in two of the cases. Please consider this an addendum to my letter to Kevin Kahn dated April 7, 2015.

The staff report erroneously claims a mandate in Section 30010 of the Coastal Act[1] to consider the issue of constitutional taking "if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking." In *Sierra* Club *v. California Coastal Commission* (1993) 12 Cal.App.4th, 602, 617-618, the Court of Appeals held the opposite. The court says:

> "The County relies on section 30010, which expresses a legislative intent that the Coastal Act *not* grant the Commission or any county the '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

[1] Section 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."

> compensation therefor....' However, that does not support the anticipatory sort of takings balancing advocated by the County. The section appears designed to foreclose any claim that the Coastal Act authorizes takings *without compensation,* a construction which would leave the Act open to a facial challenge, (citations omitted) It does not ask the Commission to balance takings concerns in ESHA decisions."

(emphasis in original) So, section 30010 is simply declaratory of the constitutional takings provision itself: If a taking is established using the proper procedures, just compensation must be paid. There is no mandate for the County to do a takings analysis. Other controlling judicial decisions decisively reject such an interpretation.

In *Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158, 1178, the Court of Appeals had this to say about the authority of the Coastal Commission to decide takings issues: "...the Coastal Commission is not legislatively authorized to consider much of the evidence and many of the issues relevant to an inverse condemnation action. To the contrary, the Commission's powers and duties are only those vested in it by the Coastal Act....In short, the Commission is authorized to make and enforce rules and whether to grant permits. It is not an adjudicatory body authorized to decide issues of constitutional magnitude." Obviously, the same reasoning would apply to the Marin Community Development Agency.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the California Supreme Court held that whether a constitutional taking has occurred is a judicial question that can be addressed only after administrative remedies provided by the state have been completed. The Supreme Court, quoting from another case, says:

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue...[U]ntil there has been a 'final, definitive position regarding' how the regulations will be applied to the land, a court cannot determine whether a compensable taking has occurred."

Id. p.10. Later, the Court says:"We agree with the *Healing* court, [*Healing v. California Coastal Commission*, supra] however, that an administrative agency is not competent to decide whether its own action constitutes a taking...." *Id.* p. 15-16. In other words, the role of the agency is to decide whether the development violates the LCP: Constitutional taking issues are for the courts to decide. For an agency to use taking analysis to decide whether or not an application for a coastal permit should be granted is putting the cart before the horse.

In addition to making clear that the agency is not competent to decide whether a taking has occurred, the Supreme Court in *Hensler* addressed the procedures that must be followed by the applicant in making a takings claim. In California, that requires filing an Administrative Mandamus action ("as applied" takings) or a Declaratory Judgment action ("facial" takings) to establish whether a taking has occurred; joined with or followed by an Inverse Condemnation action to determine damages, which must be tried by a jury unless waived. A necessary predicate to filing such an action is a final agency decision applying its regulation to the land in issue.

Furthermore, the evidence must be presented by witnesses under oath and subject to cross-examination and other procedural requisites, so an administrative record that may have been compiled by the agency without these safeguards is not sufficient. *Hensler, Id.* p. 16.

One can appreciate the motivation of governmental agencies to avoid having to pay compensation if a taking claim is successful. But the answer is not to prejudge the issue in an administrative forum that can only be determined by a full blown trial. In *Hensler,* the Supreme Court addressed this very problem and provided a remedy:

> "The California procedural requirements to which plaintiff objects do no more than ensure to the state its right to a prepayment judicial determination that the ordinance or regulation is excessive and will constitute a taking, thus affording the state the option of abandoning the ordinance, regulation or challenged action, or exempting parcels from its scope if the regulation or use is excessive. As we noted above, the United States Supreme Court has recognized repeatedly the right of the state to reserve the option of rescinding a statute that imposes excessive regulation, ..." 8 Cal.4th at 19.

The Staff Report asserts that "the addition of such criteria serves to provide all interested persons with a more systematic approach to evaluate whether there is substantial evidence of a takings risk and decreases the possibility of variability in implementation." Staff Report p.6. Instead of a systematic approach, it will produce a procedural mess.

First, putting aside the legality as discussed above, the proposed provision does not say anything about "substantial evidence." Any potential claim is enough. This gives the DZA or other decision makers *carte blanche* to find that that there is a potential takings claim that justifies overriding the applicable regulation.

Second, it enables the staff to anticipate a takings claim even though the applicant has never raised the issue. Thus, the agency is overriding an LCP provision based on pure speculation about a takings claim that may never be made. This turns takings procedure on its head.

Third, suppose the staff decides that there is a potential takings claim. How does the opponent appeal that determination without getting into exactly the legal/factual inquiry that the California Supreme Court has said are exclusively within the province of the courts? Doesn't this put the burden on the opponent to file some kind of lawsuit when it is the applicant who is supposed to file an administrative mandamus/inverse condemnation action? What about witnesses testifying under oath and cross-examination, procedural safeguards that the Supreme Court in *Hensler* said were required to resolve takings claims?

Finally, there is an obvious conflict of interest when county officials are making statements about takings. If opponents were to eventually prevail and the applicant files an administrative/inverse condemnation case, the county will have to defend against that lawsuit. Statements previously made would no doubt be used against the county.

One can understand the agency's desire to avoid having to pay compensation in a takings lawsuit. But the Court in *Hensler* provided a remedy. The courts have prescribed an orderly process by which takings claims must be raised and adjudicated. As the California Supreme Court has held, the proper role of the government agencies is to apply the LCP. Takings issues are for the courts.

Respectfully submitted,

Richard S. Kohn

Richard S. Kohn

April 25, 2015

5 Ahab Drive
Muir Beach, CA 94965

Charles Lester
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: California Coastal Commission Policy re: Constitutional Takings

Dear Mr. Lester,

This shall expand on written comments I made at the Commission hearing on April 16, 2015 regarding the Commission's practice of overriding provisions of the LCP in order to avoid a regulatory "taking." See my letter dated April 15, 2015 in Application No. A-3-SLO-98-061 (Anthony Wolcott). See also my comments dated April 16, 2015 regarding proposed section 22.70.180 of the Implementation Code, (withdrawn at the hearing).

The Staff Report in the Wolcott hearing states that "In situations in which the LCP requires denial of a project, the Commission typically determines whether that denial would result in an unconstitutional taking of private property without just compensation. If the denial would likely result in an unconstitutional taking, then the Commission may interpret the LCP in a manner that would avoid that result."

Similarly, the addendum to the Staff Report for the April 16 hearing on the Implementation Code amendments states that "The Commission has approved numerous LCPs that implement the mandate of Coastal Act Section 30010,...." "The Commission itself has a longstanding practice of applying the Coastal Act, on a case by case basis, in a manner consistent with Section 30010 if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking."

This policy violates *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10 and *Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158. 1178. Because a takings claim can never be ripe until after the Commission has applied the LCP provisions to an application for a coastal permit, and because only a court can decide whether a constitutional taking has occurred, *ipso jure* the Commission lacks authority to engage

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in a takings, or potential takings, analysis. Engaging in such an inquiry puts the cart before the horse because it inevitably requires the Commission to make legal and factual determinations that can only be made by the judicial branch after a case is ripe for decision.

At the April 16 hearing, Chief Counsel Chris Pederson asserted that the authority to undertake an analysis of whether applying the LCP would potentially give rise to a takings claim lies in section 30010 of the Coastal Act. He sought to distinguish *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602, 617-18 on its facts. In that case, the county argued that it was entitled to balance the consequence of designating a pygmy forest as an ESHA against the likelihood of a takings claim. It claimed that granting ESHA status *might* constitute a prohibited taking of private property without just compensation which entitled it to withhold ESHA status on that basis. 12 Cal.App.4th at 617.The court held that section 30010 "does not support the anticipatory sort of takings balancing advocated by the county." Interpreting Section 30010, the court held that "The section appears designed to foreclose any claim that the Coastal Act authorizes takings *without compensation*, a construction that would leave the Act open to a facial challenge. (citations omitted) It does not ask the Commission to balance takings concerns in ESHA decisions." (emphasis in original)

There is no reason why the court's interpretation of the statute is confined to ESHA designations. Like *Sierra Club v. California Coastal Commission, supra*, the Commission's policy at issue here involves balancing potential takings claims against enforcing provisions of the LCP. It is well established that courts must construe statutes so as to avoid serious constitutional questions. *Elkins v. Superior Court* (2007) 41 Cal. 4th 1337, 1357. Construing Section 30010 to allow the Commission to adjudicate takings questions would plainly conflict with *Hensler* and *Healing*: constitutional takings issues are exclusively within the purview of the courts.[1]

Mr. Pederson asserted that the takings issue would eventually be presented to the courts for review with all the procedural protections required by *Hensler*. That might be the case where the Commission found that the project did not raise a potential taking issue and denies the permit. In those situations, the applicant would have an incentive to file an administrative mandamus action to determine whether a taking had occurred. But that is not the case where the Commission determines that there is a potential takings claim, overrides the LCP, and grants the permit.

[1] The court in *Sierra Club* emphasized that takings claims only become ripe after a final administrative decision as to specifc land and that an applicant must utilize the procedures created by the state in order to obtain compensation. 12 Cal.App.4th at 618. Any doubt that only a court can decide whether a compensable taking has occurred as the result of agency action was resolved by *Hensler* in 1994.

The California legislature has created procedures for bringing takings cases before the courts. The applicant must file an administrative mandamus action joined with or followed by an inverse condemnation case. When the Commission decides that there is a *potential* takings claim and grants the permit, it insulates the takings issue from judicial review because the applicant would have no reason to file an administrative mandamus action. The decision that the denial of a permit *potentially* would give rise to a takings claim forecloses any judicial inquiry into whether a takings claim can actually be proven. Thus, the Commission's anticipatory decision is, in fact, a final adjudication.

Furthermore, the Commission's procedure essentially allows an applicant to proceed with development in violation of an LCP regulation that would otherwise apply without even knowing whether the applicant would actually file an administrative mandamus action if the permit application were denied. In fact, it enables the Commission to raise the takings issue even though the applicant has not uttered the word "taking" or advanced any argument to that effect. The applicant and the Commission would ordinarily be on opposite sides of the issue in any takings litigation. The policy creates the incongruous situation where the Commission is acting as the applicant's surrogate.

There may be many reasons why the applicant would decide not to pursue such an action. Chief among them is that regulatory takings claims based upon diminution of value due to the application of zoning restrictions are rarely successful. *See, William C. Haas v. City and County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir. 1979)(95% reduction not a taking) citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 (loss of value of more than 90% not a taking). Thus, the agency's decision to allow the project to proceed is based upon a preliminary assessment, using fact finding procedures that the Supreme Court in *Hensler* has said are not sufficient, and based upon an assumption that the applicant would initiate a legal action which she may never pursue.

In connection with section 22.70.180 of the Implementation Code, the Addendum to the Staff Report advanced several arguments in support of the Commission's practice. For example, it argues that its policy is long standing and entitled to great weight. To be sure, "in general courts accord significant weight and respect to a long standing statutory construction—whether in the form of a policy or a rule—by the agency charged with enforcement of the statute." *Ordlock v. Franchise Tax Board* (2006) 38 Cal.4th 897, 910. Nevertheless, the ultimate responsibility for construing statutes rests with the courts. *Ibid.* And, unlike the typical case where a court is called upon to interpret a statute for the first time, here the courts have already spoken. Since 1993 when the Court of Appeals decided *Sierra Club v. California Coastal Commission,* the Commission should have known that its interpretation of Section 30010 is erroneous.

In any event, no deference to administrative practice is due in light of *Hensler* and *Healing*, which held in 1994 that an administrative agency is not competent to decide whether its own action constitutes a taking. *Hensler*, Id. 15-16. The Commission's interpretation of Section 30010 gives rise to a serious constitutional issue regarding the competence of administrative agencies to adjudicate takings issues; insulates the decision from judicial review; negates the normal procedure for raising takings issues; violates the principle of *stare decisis*; and undermines land use regulation.

The Staff also argues that *absent such a procedure, the Commission or a local government could be exposed to the risk of the permit action being overturned* or face liability for takings damages and attorneys' fees. The italicized assertion amounts to a tacit admission that once the agency makes its anticipatory decision to grant a permit, there is no avenue for overturning it.

With respect to its exposure to pay compensation, in *Hensler* the Supreme Court addressed this issue. It has long been the law that if an administrative mandamus action determines that a taking has occurred, the government agency has the option of rescinding or amending the provision, or taking other appropriate action, to avoid having to pay compensation. Thus, there is a procedure for addressing the Commission's concern. The answer is not to initiate a preemptive strike to override a validly enacted regulation in the LCP.

Attorneys' fees are normally only awarded in frivolous cases: if the agency has a reasonable position it should have nothing to fear. As noted above, regulatory takings claims based upon diminution in value are rarely, if ever, successful.

The Staff argues that its practice provides interested persons with a systematic approach to evaluate a takings risk. For the reasons stated above, instead of a systematic approach it results in a final adjudication in the guise of an interlocutory one and forecloses judicial review.

The Commission's *ultra vires* policy of overriding LCP provisions in order to avoid a perceived takings claim exceeds its authority as held by the California Supreme Court and should be rescinded. By the same token, Section 22.70.180, authorizing the county to use such a procedure, should be eliminated from the Implementation Code when it is reintroduced.

I would be very appreciative if you would provide me with any rebuttal which you may have in response to the foregoing argument.

Very truly yours,

Richard S. Kohn

Richard S. Kohn

cc. Chris Peterson, Chief Counsel
Kevin Kahn, District Supervisor, LCP Planning

ATTACHMENT 2

STATE OF CALIFORNIA – THE RESOURCES AGENCY

EDMUND G. BROWN, JR., Governor

CALIFORNIA COASTAL COMMISSION

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

Takings Information

In some cases, additional application information is needed regarding an applicant's investment-backed expectation (including, but not limited to, cases where development is proposed in environmentally sensitive habitat areas (such as coastal dunes and wetlands), other highly sensitive areas (such as the critical viewshed in Big Sur), high hazard areas, etc.

Background

If an applicant for a coastal development permit can demonstrate that he or she has a sufficient real property interest in the property to allow the proposed project, and that denial of the proposed project based on application of Coastal Act policies would deprive his or her property of all economically viable use, some development may be allowed even where a Coastal Act policy may otherwise prohibit it, unless the project would constitute a nuisance under State Law. A specific development proposal may still be denied, however, if a more modest alternative proposal could be approvable, and thus assure the property owner of some economically viable use. Any development approved pursuant to this provision must conform to all other applicable Coastal Act requirements.

Information Needed

Since the Coastal Commission must analyze whether its action in denying a permit application would constitute a taking, in order to comply with Section 30010 of the Coastal Act and the California and United States Constitutions, the application filing requirements shall include information about the nature of the applicants' property interest. When an application involves property in which development could potentially be completely prohibited (for example, because the property contains environmentally sensitive habitat areas, is located in the critical viewshed, is subject to coastal hazards, etc.), the applicant shall submit the following information as part of their coastal development permit application:

1. Date the applicant purchased or otherwise acquired the property, and from whom.
2. The purchase price paid by the applicant for the property.
3. The fair market value of the property at the time the applicant acquired it. Describe the basis upon which the fair market value is derived, including any appraisals done at the time.
4. Changes to general plan, zoning or similar land use designations applicable to the subject property since the time of purchase of the property. If so, identify the particular designation(s) and applicable change(s).
5. At the time the applicant purchased the property, or at any subsequent time, has the property been subject to any development restriction(s) (for example, restrictive covenants, open space easements, etc.), other than the land use designations referred to in question (4) above?

6. Any changes in the size or use of the property since the time the applicant purchased it. If so identify the nature of the change, the circumstance and the relevant date(s).

7. If the applicant has sold or leased a portion of, or interest in, the property since the time of purchase, indicate the relevant date(s), sales price(s), rent assessed, and nature of the portion of interest sold or leased.

8. Is the applicant aware of any title report, litigation guarantee or similar document prepared in connection with all or a portion of the property? If so, provide a copy of each such document, together with a statement of when the document was prepared and for what purpose (e.g., refinancing, sale, purchase, etc.).

9. Has the applicant solicited or received any offers to buy all or a portion of the property since the time of purchase? If so, provide the approximate date of the offer and the offered price.

10. Identify, on an annualized basis for the last five calendar years, the applicant's costs associated with ownership of the property. These costs should include, but not necessarily be limited to, the following:

    a. property taxes

    b. property assessments

    c. debt services, including mortgage and interest costs; and

    d. operation and management costs;

11. Apart from any rent received from leasing all or a portion of the property (see question #7, above), does the applicant's current or past use of the property generate any income? If the answer is yes, list on an annualized basis for the past five calendar years the amount of generated income and a description of the use(s) that generates or has generated such income.

April 25, 2015

5 Ahab Drive
Muir Beach, CA 94965

Charles Lester
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

PUBLIC RECORDS ACT REQUEST

Dear Mr. Lester,

Under the California Public Records Act Sec. 6250 et seq., I am requesting that the following documents regarding the Commission's policy of interpreting provisions of certified Local Coastal Programs (LCPs) in a manner that would allow coastal permit applications to be granted in order to avoid potential constitutional takings claims under the California or Federal Constitutions be produced for my inspection.

1.All documents, including but not limited to, handbooks, manuals, instructions, LCPs guidelines and guidances showing how long the policy regarding potential takings has been in effect and setting forth or discussing the policy and how it should be applied by the Coastal Commission staff;

2.Any statistical records maintained by the California Coastal Commission showing how many times a coastal permit has been granted in order to avoid a constitutional taking claim. The time frame for this request is January 15, 1993 to the present.

3. All records maintained by the California Coastal Commission identifying by application name and number or other identifying criteria cases in which the Commission has granted a coastal development permit in order to avoid a constitutional taking claim. The time frame for this request is January 15, 1993 to the present.

4.All documents, including but not limited to, staff reports and resolutions adopted by the California Coastal Commission in specific cases in which a coastal development permit was granted in order to avoid a potential takings claim. The time frame for this request is January 15, 1993 to the present.

5. All documents showing judicial review of a decision by the Commission to grant a coastal permit in order to avoid a constitutional takings claim. This request is limited to cases in which there has been a final adjudication or where the case has been settled. The time frame for this request is January 15, 1993 to the present.

The California Public Records Act requires a response within ten business days. If access to the records I am requesting will take longer, please contact me with information about when I might expect a copy or the ability to inspect the requested records. *Because the response to document request No. 4 for records of specific cases may be voluminous, I am prepared to discuss how the request might be limited or phased to produce sufficient examples in order to meet my needs.* Please feel free to contact me at brendakohn@aol.com or (415) 383-8220.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Richard S. Kohn

Richard S. Kohn

cc. Chris Pederson, Chief Counsel

Exh. G-2

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

May 7, 2015

Richard S. Kohn
5 Ahab Drive
Muir Beach, CA 94965

Re: Your Public Records Act Request dated April 25, 2015

Dear Mr. Kohn:

Your above-referenced Public Records Act request to the California Coastal Commission (Commission) has been referred to me for response.

This letter will serve as the California Coastal Commission's response to your request. Pursuant to California Government Code section 6253, we will make available all requested items that (1) constitute "public records;" (2) are identifiable, based upon a reasonable description (meaning locatable with reasonable effort); (3) are in the Commission's possession; and (4) are not exempt from disclosure pursuant to California Government Code section 6254 or any other express provision of law.

You have requested five inter-related categories of records with regard to the Commission's approval of coastal development permits in order to avoid a constitutional taking. Your first item requests written guidance "setting forth or discussing the policy [regarding potential takings] has been in effect and setting forth or discussing the policy and how it should be applied by the Coastal Commission staff." The Commission has no non-exempt records responsive to this request. Exempt records include attorney-client correspondence (Government Code § 6254(k); Evidence Code § 954).

Your second item requests statistical records maintained by the Commission showing the number of times a coastal development permit has been granted to avoid a constitutional taking claim. The Commission has no such statistical records, as it does not track Commission approvals in such a manner.

Your third and fourth items relate to specific types of Commission approvals. Commission permit files, however, are maintained by application number, address, applicant and sometimes Assessor Parcel (or Identification) Number. The Commission does not maintain its records by categories such as approvals to avoid a constitutional taking. In order to respond to your request, Commission staff would need to search the file of every Commission coastal development permit approved by the Commission between January 15, 1993 and the present. These documents are therefore not locatable with reasonable effort. If you identify specific projects in which you are interested, by application number, applicant name or address, then we would be happy to provide you with the relevant staff reports or permit files. You may be able to identify such projects by searching the Commission's on-line agendas.

Finally, your fifth item requests documents showing judicial review of such decisions. The Commission does not track litigation in a manner that would allow it to search for litigation related to coastal development permits that were approved to avoid a constitutional taking. Similar to your third and fourth requests, in order to respond to this request, staff would need to review the file of every petition or lawsuit filed against the Commission from January 15, 1993 to the present. Commission staff is not obligated under the Public Records Act to undertake such an extensive review, given that these documents are not locatable with reasonable effort.

Please contact me at the address above if you have any questions about this response.

Sincerely,

Louise Warren

Louise Warren
Senior Staff Counsel

May 20, 2015

5 Ahab Drive
Muir Beach, CA 94965

Charles Lester
Executive Director
California Coastal Commission
North Central District Office
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: California Coastal Commission "potential takings" policy

Dear Mr. Lester,

In addition to the arguments that I have heretofore made in support of rescinding the Commission's "potential takings" policy, I believe that the policy is invalid under the California Administrative Procedures Act (APA). It appears that the policy has neither been adopted as a regulation nor filed with the Secretary of State as required by the APA. Please consider this a petition pursuant to Government Code sec. 11340.6 requesting the repeal of the policy, which has all the indicia of being an "underground regulation."

Section 11340.5(a) states:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

The term "regulation" is defined in Section 11342.600:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

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The Commission's "potential takings" policy, however misguided it may be, was created in order to implement and interpret Section 30010 of the Coastal Act. It clearly is a standard of general application or rule. As stated by the Commission staff, "In situations in which the LCP requires denial of a project, the Commission typically determines whether that denial would result in an unconstitutional taking of private property without just compensation. If denial would likely result in an unconstitutional taking, then the Commission may interpret the LCP in a manner that would avoid that result." Staff Report, Application of Anthony Wolcott for CDP, Application no. A-3-SLO-98-061 dated March 26, 2015. And in its Addendum regarding Marin County's proposed IP, the Commission states "The Commission itself has a longstanding practice of applying the Coastal Act, on a case by case basis, in a manner consistent with Section 30010 if there is substantial evidence that no development consistent with the Coastal Act or LCP policies might avoid a taking." LCP-2-MAR-13-0224-1 Part B (Marin Implementation Plan Update) Addendum p.6.

I have addressed the merits of why the Commission's "potential takings" policy is invalid in my letters dated April 16, 2015 and April 25, 2015 which I incorporate by reference herein. None of that matters if the commission failed to follow the proper compliance procedures required by the APA. The Commission obviously has the authority to rescind its underground policy.

I find nothing in Title 14 of the California Code of Regulations for the Coastal Commission adopting the "potential takings" policy as a regulation as required by the APA. In the absence of documentation that the Coastal Commission has complied with the APA, the policy should be immediately repealed apart from any other substantive arguments demonstrating its invalidity. I would appreciate it if you would respond to this petition as prescribed by Government Code Sec. 11340.7 and advise me as to the Commission's position with respect to this issue.

Thank you for your consideration.

Respectfully submitted,

Richard S. Kohn

Richard S. Kohn

cc. Chris Pederson, Chief Counsel

Attachment 3

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

Debra M. Cornez
Director

August 4, 2015

Richard S. Kohn
5 Ahab Drive
Muir Beach, California 94965

Dear Mr. Kohn:

The Office of Administrative Law received your petition alleging that the California Coastal Commission has issued, used, enforced, or attempted to enforce an underground regulation. OAL declines to accept your petition.

Our decision in no way reflects on the merits of the underlying issue presented by your petition. It does not constitute a judgment or opinion on any issue raised therein. Nothing in our decision restricts your right or ability to pursue this matter directly with the California Coastal Commission or in court.

Sincerely,

Elizabeth A. Heidig

Elizabeth A. Heidig
Senior Counsel

cc: Chris Pederson, Chief Counsel, California Coastal Commission

Attachment 3