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Appeal Filed: 7/23/2017
49th Day: Waived
Staff: Mike Watson - SC
Staff Report: 11/22/2017
Hearing Date: 12/13/2017

APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION ONLY

Appeal Number: A-3-MCO-17-0035

Applicants: Robert Ching

Appellant: Highlands Covenants Group

Local Government: Monterey County

Local Decision: Coastal development permit (CDP) application number PLN 140483 approved by the Monterey County Zoning Administrator on April 13, 2017, and that approval upheld on appeal to the Board of Supervisors on June 13, 2017.

Location: 161-B Spindrift Road (APN 241-191-005) in the Carmel Highlands area of Monterey County.

Project Description: Construction of a test water well.

Staff Recommendation: No Substantial Issue

Important Hearing Procedure Note: This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally and at the discretion of the Chair, testimony is limited to three minutes total per side. Please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the de novo phase of the hearing will occur at a future Commission

meeting, during which the Commission will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

SUMMARY OF STAFF RECOMMENDATION

Monterey County approved a coastal administrative permit authorizing construction of a test well to assess the potential for installing a future domestic water well on a vacant residential property along Spindrift Road in the Carmel Highlands area of Monterey County, just south of Point Lobos and seaward of Highway One.

The Appellant contends that the County-approved project is inconsistent with Monterey County Local Coastal Program (LCP) policies related to the protection of environmentally sensitive habitats (namely wetland and riparian habitats), sensitive species, and water quality, as well as those related to coastal permit review procedures. After reviewing the local record, staff believes that the approved project does not raise a substantial issue with respect to the project's conformance with the Monterey County LCP.

In terms of ESHA, wetland and riparian areas were appropriately identified, and the County imposed LCP-required setbacks from these areas. In addition, the County included conditions to address other potential habitat-related concerns (e.g., to protect nesting birds). In terms of water quality, the test well is located almost 300 feet from the Pacific Ocean and there is no evidence that the well will have any impact on marine or other resources. Regarding the County's coastal permitting review process, there do not appear to have been any LCP inconsistencies in terms of the processing for the test well. To the extent the Appellant is arguing about potential impacts from a domestic water well (and not a test well), such arguments are premature, including because any such domestic well would be the subject of future coastal development permitting actions should a residence on the site be proposed at some future time. The County here only approved a test well, and not a single-family residence with related infrastructure (e.g., well, septic system, etc.), which would be evaluated for LCP consistency when and if they are proposed at some point in the future.

Staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP conformance issue, and that the Commission decline to take jurisdiction over the CDP for this project. The single motion necessary to implement this recommendation is found on page 4 below.

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APPENDICES

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EXHIBITS

Exhibit 1 – Project Location Map and Aerial Images

Exhibit 2 – Project Site Images

Exhibit 3 – County’s Final Local Action Notice

Exhibit 4 – Appeal of Monterey County’s CDP Decision

Exhibit 5 – Applicable Carmel Area Land Use Plan Policies

Exhibit 6 – Test Well Site Plans

Exhibit 7 – Wetland Delineation Map

I. MOTION AND RESOLUTION

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission will not hear the application de novo and that the local action will become final and effective. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-MCO-17-0035 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603. I recommend a yes vote.*

***Resolution to Find No Substantial Issue.** The Commission finds that Appeal Number A-3-MCO-17-0035 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.*

II. FINDINGS AND DECLARATIONS

A. PROJECT LOCATION, BACKGROUND, AND DESCRIPTION

Project Location and Description

The project site is located at 161-B Spindrift Road, just south of Point Lobos and seaward of Highway One in the unincorporated Carmel Highlands area of Monterey County. The vacant 1.3-acre lot is zoned low density residential (LDR-1-D (CZ)), which allows for a maximum density of one residential unit per acre. Test wells are a principally permitted use within the LDR zone district with the issuance of a coastal administrative permit. The purpose of the County-approved test well is to determine if an adequate groundwater source is available on the site to allow for the future construction of a single-family residence on the property.

The parcel is relatively flat with a gentle westward slope toward the Pacific Ocean, which is located roughly 300 feet to the west from the location of the County-approved well. Past fire management clearance and other disturbances have altered the landscape of the parcel. The remaining vegetation on the site is comprised mainly of exotic, invasive species with a few native trees and several native perennial and forb species evident.

The surrounding neighborhood on Spindrift Road is made up of mostly older one- and two-story single-family residences, along with some newer or remodeled homes. Many of the homes are served by on-site water wells. The Spindrift neighborhood lies within the California American (Cal-Am) Water Company's service territory, although requests to Cal-Am for new water connections are not being granted at this time due to a moratorium on new water connections imposed by the State Water Resources Control Board, which has directed Cal-Am to reduce its diversions from the Carmel River.

See **Exhibit 1** for a location map and aerial images of the subject parcel. See **Exhibit 2** for photographs of the well site.

Background

In 2002, a test well was constructed on the property by a prior owner who did not obtain the required coastal administrative permit. Monterey County opened a code enforcement case and, in response, the prior property owner filled the well with dirt and concrete, but did not “cap” the well per County requirements. The current owner (i.e. the Applicant) purchased the property in 2004; however, the Applicant did not seek to undertake any development on the property for more than a decade. Then in 2014, the Applicant applied to the County for a coastal administrative permit to complete the capping process for the existing unpermitted well and to construct a new test well in a different location on the property. As part of the permit process, the Applicant submitted all necessary documentation to the County, including two biological resources reports, a wetland delineation report, and several arborist assessments. In response to the findings in these reports/assessments, the Applicant amended his application to locate the test well in the same location as the previously unpermitted test well, which is located more than 100 feet from a delineated wetland on the site and will provide a greater setback from mature Monterey cypress trees growing on and adjacent to the property (see **Exhibit 6** for the approved location of the well and the approved project plans).

B. MONTEREY COUNTY CDP APPROVAL

On April 13, 2017 the Monterey County Zoning Administrator approved coastal administrative permit (CE020247) approving the test well project as described in the paragraphs above. That decision was appealed by the current Appellant to the County Board of Supervisors (Board). The appeal was heard at a June 13, 2017 Board hearing, at which time the Board upheld the Zoning Administrator’s decision.

The County’s Final Local Action Notice (see **Exhibit 3**) was received in the Coastal Commission’s Central Coast District Office on Wednesday June 21, 2017. The Coastal Commission’s ten-working-day appeal period for this action began on Thursday June 22, 2017 and concluded at 5 p.m. on Thursday July 6, 2017. One valid appeal (see **Exhibit 4**) was received on Monday, July 3, 2017.

C. APPEAL PROCEDURES

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. (Coastal Act Sections 30603(a)(1)-(4).) In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an

energy facility is appealable to the Commission. (Coastal Act Section 30603(a)(5).) This project is appealable because it is located within 300 feet of the coastal bluff.

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to consider a CDP for an appealed project de novo unless a majority of the Commission finds that “no substantial issue” is raised by such allegations.¹ Under Section 30604(b), if the Commission conducts the de novo portion of an appeals hearing (upon making a determination of “substantial issue”) and finds that the proposed development is in conformity with the certified LCP, the Commission must issue a CDP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is *not* located between the nearest public road and the sea and thus only a finding that the proposed development is in conformity with the Monterey County LCP is necessary -if the Commission were to approve the project following the de novo portion of the hearing.²

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant, persons opposed to the project who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding the substantial issue question must be submitted in writing. (California Code of Regulations, Title 14, Section 13117.) Any person may testify during the de novo CDP determination stage of an appeal (if applicable).

D. SUMMARY OF APPEAL CONTENTIONS

The appeal raises several contentions regarding the County-approved project’s consistency with the LCP that can generally be categorized into two main topical areas: 1) habitat impacts; and 2) other impacts. Specifically, the Appellant contends that the approved project is based on an incomplete and flawed wetland delineation, that it is not consistent with the LCP’s stream / riparian buffer requirements, and that it fails to consider impacts to Yellow Warbler and Coast Range Newt. In addition, the Appellant contends that the project is being piecemealed, that it will result in illegal discharges to the Carmel Bay Area of Special Biological Significance, and that the County did not appropriately evaluate impacts under CEQA. Please see **Exhibit 4** for the appeal contentions.

¹ The term “substantial issue” is not defined in the Coastal Act or in its implementing regulations. In previous decisions on appeals, the Commission has considered the following factors in making substantial issue determinations: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. Even when the Commission chooses not to hear an appeal (by finding no substantial issue), appellants nevertheless may obtain judicial review of a local government’s CDP decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, Section 1094.5.

² Spindrift Road is the nearest public road along the sea in this area, but the Applicant’s property is located on the inland side of Spindrift Road, and thus the project site is not located between the nearest public road and the sea.

E. SUBSTANTIAL ISSUE DETERMINATION

Biological Resources

Wetlands Contention

The Appellant contends that the wetland delineation is incomplete and flawed because it was conducted during a period of drought. The Applicant's consultants note, however, that wetland indicators develop over a long period of time and remnants of these indicators would be observed even during drought conditions. While documented past disturbance of the site has affected the site's normal vegetative cover, if wetlands occurred on the site at least some hardy species of wetland plants (e.g., willows, rushes, sedges) would be expected to be present during a drought. Staff Ecologist Dr. Jonna Engel concurs with this assessment.

Carmel Area Land Use Plan (LUP) Policy 2.3.3.1 of the Carmel Area LUP's Environmentally Sensitive Habitats (ESHA) chapter requires that development, including vegetation removal, excavation, grading, etc., be avoided in critical and sensitive habitat areas (e.g., wetlands, riparian corridors, sites of known rare and endangered species of plants and animals, etc.). In order to ensure that wetlands are protected, the LUP establishes a 100-foot buffer from the edge of all coastal wetlands and only resource-dependent development is allowed within the wetland buffer (LUP Policy 2.3.4.1 *Wetland and Marine Habitats*). Applicants who propose development projects that may be located in an area in which ESHA has been documented or could be expected to occur are required to prepare a field survey to determine the presence and extent of any sensitive habitat (LUP Policy 2.3.3.5). See **Exhibit 5** for all applicable LUP policies.

During the course of the County's application review, the Applicant's consultants performed the biological surveys and wetland delineation required by the LUP. The wetland delineation included monitoring 14 test points on the property, all of which were negative for hydric soils or surface or near-surface waters that would indicate the presence of a wetland. However, the delineation determined that one wetland parameter³ was present along the southeast corner of the site where the predominant vegetative cover included poison hemlock, which is a facultative⁴ wetland plant (see **Exhibit 7** for the wetland delineation map). Thus, this area of the property meets the Commission's definition of a wetland. However, the County-approved well is located more than 100 feet from the edge of this wetland, and thus is consistent with the requirements of LUP Policies 2.3.3.1 and 2.3.4.1 with respect to avoidance of development in wetlands and the 100-foot wetland buffer requirement. Staff Ecologist Dr. Jonna Engel concurs with the findings of the wetland delineation.

Stream Contention

The Appellant contends that a drainage corridor on the northern portion of the property is a stream and that the vegetative cover associated with this drainage corridor constitutes riparian habitat, and that the well is not set back adequately from this habitat. This drainage corridor (see **Exhibit 7** for its location) originates from a nearby Highway One drainage culvert, and there is no evidence in the record that the drainage corridor functions as a perennial or intermittent

³ To define an area as a wetland, the Coastal Commission requires that only one parameter (i.e. either hydrology or hydrophytic vegetation or hydric soils) be present.

⁴ Facultative plants are equally likely to occur in wetlands or non-wetlands.

stream. Additionally, the biological surveys of the property found no wetland or riparian vegetation associated with this drainage corridor. Furthermore, at the time of the most recent surveys (May 2017) following one of the wettest winters on record, there was no overland flow seen within the northern drainage corridor. And finally, even if the drainage corridor was defined as an intermittent stream, LUP Policy 2.3.4.1 (*Riparian Corridors and Other Terrestrial Habitats*) requires a 50-foot setback from a stream, and in this case the approved well is located more than 60 feet from the drainage corridor. Staff Ecologist Dr. Jonna Engel has reviewed the biological reports regarding the drainage corridor and concurs with its conclusion.

Yellow Warbler and Coast Range Newt

Lastly, the Appellant states that he observed the presence of two species of concern at the property, Yellow Warbler and Coast Range Newt, and contends that the County failed to appropriately consider impacts to these species as required under CEQA. Neither the Yellow Warbler nor the Coast Range Newt are federally- or state-designated as rare or endangered or threatened. They are, however, designated as California Species of Special Concern, and are likely to occur on or near the property at times.

The Yellow Warbler is a riparian-obligate species that requires dense cottonwood, sycamore, and willow thicket for suitable nesting habitat. The presence of nesting warblers on the project site is highly unlikely given the absence of these types of suitable nesting habitats on the site. As noted above, there are no native plant constituents, obligate, or even typical riparian plant species on the subject property. In addition, the County conditioned its approval to require a pre-construction nest survey prior to any construction activities to determine if any raptor or migratory bird nests are present within the project site or within 300 feet of ground disturbing/vegetation removal activities. If nesting birds are found on the project site, The County's approval requires that appropriate buffers be established by the project's biologists to protect nesting birds (see pages 41-51 of **Exhibit 3** for the County's conditions).

The Coast Range Newt is found in stream habitats with riparian cover. However, as discussed above, the drainage corridor on the site does not constitute a stream and does not contain any riparian habitat. In addition, the approved well is located more than 60 feet from the drainage corridor.

Biological Resources Conclusion

For all of the above reasons, the approved project does not raise a substantial issue of conformance with the above-cited LCP policies with respect to biological resources.

Other Contentions

The Appellant contends that there is the possibility that the approved project has the potential to cause illegal discharges from surface water inundation of a future septic system into the Carmel Bay, which is an Area of Special Biological Significance (ASBS). Additionally, the Appellant complains that the County's approval is invalid because it did not review the complete project, which is future residential development of the property.

The current project is for a test well with associated temporary access and staging for well construction, all of which is located outside of the 100-foot wetland setback and more than 60-

feet from the northern drainage. Access and staging will occur on existing disturbed areas of the site. Construction of a test well on a residentially-zoned property will not have any potential for significant adverse impacts on the environment as conditioned by the County's permit, which limits development to the construction of a test well, provides for specific corrective actions if archaeological resources or biological resources are found, requires tree and root protection during construction, and restoration of all disturbed areas with native, non-invasive plant species (see pages 41-51 of **Exhibit 3** for the County's conditions).

Additionally, the project site is located outside of the watersheds for both the Carmel ASBS and the Point Lobos ASBS. Thus, there will be no discharge to either ASBS from the well drilling activities. If in the future the Applicant wishes to develop a single-family residence (including a permanent water well and a septic system), the Applicant will need to submit a separate CDP application to the County, which will be evaluated for LCP consistency at that time. Finally, the Appellant's CEQA-based argument that this approval "piecemeals" or improperly segments the "complete" anticipated residential project is not a proper basis for appealing this CDP to the Commission (Pub. Res. Code Section 30603(b)(1)). Thus, this contention does not raise a substantial issue of conformance with the LCP.

F. CONCLUSION

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a de novo CDP for such development. At this stage, the Commission has the discretion to find that the project does not raise a substantial issue of LCP conformance. As explained above, the Commission has in the past used the following five factors in its decision of whether the issues raised in a given case are "substantial:" the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

In this case, these five factors, considered together, support a conclusion that this project does not raise a substantial issue of LCP conformance. Regarding the first factor (degree of factual and legal support for the local government's decision), water wells are a principally permitted use in the low-density residential zone district with a coastal administrative permit. Regarding potential impacts to sensitive habitats, the County's action in approving the well location was based on appropriate protocols and requirements that include site surveys, a wetland delineation, and consistency with LCP-required habitat setbacks. The County's approval included special conditions to address other LCP-protected resources (e.g., nesting birds). Regarding the second factor (the extent and scope of the development as approved by the County), the extent of the County's approval was a test well to determine the feasibility of an onsite water supply. Thus, the extent and scope of the project is fairly minor. Regarding the third factor (the significance of coastal resources affected by the decision), the approved project includes a test water well and temporary access and staging to construct the well that will not adversely impact sensitive habitats or species or water quality based on setbacks and lack of such sensitive habitats and species onsite. Thus, the approved development does not significantly affect these sensitive

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coastal resources. Regarding the fourth factor (precedential value of the County's approval), as noted, many homes in the Carmel Highlands neighborhood are served by water wells consistent with LCP requirements because there currently is not the option of connecting to a publicly managed water purveyor. In addition, water wells are identified as a principally permitted use in the Carmel Area Land Use Plan. Finally, regarding the fifth factor (whether the appeal raises only local, or regional or statewide, issues of significance), the project approval is for a test water well on a low-density residential lot in the Carmel Highlands as is allowed per the LCP and does not implicate issues of regional or Statewide significance.

For the reasons stated above, the Commission finds that Appeal Number A-3-MCO-17-0035 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act and can be found consistent with the certified LCP.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- *161B Spindrift Wetland Assessment*, Zander Associates, June 15, 2016
- *Biological Resources Analysis*, Fred Ballerini, September 1, 2016
- *Preliminary Wetland Assessment*, Zander Associates, May 18, 2017
- *Email Letter from Horan Legal to Monterey County*, Pam Silkwood, June 1, 2017
- *Response to Written Comments by Ballerini and Zander*, Jeffrey Froke, June 5, 2017

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- MONTEREY COUNTY PLANNING STAFF
- PAMELA SILKWOOD, APPELLANT’S REPRESENTATIVE
- TINA HANNAS-DE FREITAS, APPLICANT’S REPRESENTATIVE