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**W36a**

Appeal Filed:	2/18/2004
Action Deadline:	None
Approved with Conditions:	12/9/2004
Revised Findings:	5/1/2005
Court of Appeal Remand:	12/30/2008
Staff Report:	5/25/2017
Hearing Date:	6/7/2017
Staff:	Katie Butler - SC

**STAFF REPORT: DE NOVO HEARING**

**Application Number:** A-3-MCO-04-012

**Applicant:** Brandon Shui Ling Wang

**Local Government:** Monterey County

**Project Location:** 36228 Highway 1, at Kasler Point, in the unincorporated Big Sur Coast area of Monterey County (APNs 243-251-012 and 243-251-013)

**Project Description:** Construction of a new, 2,315-square-foot single-story single-family residence and associated improvements and merging of the two project parcels

**Staff Recommendation:** Approval with Conditions

**SUMMARY OF STAFF RECOMMENDATION**

The Applicant proposes to construct a single-story single-family residence on a granitic headland known as Kasler Point on the Big Sur Coast, approximately 10 miles south of the City of Carmel-by-the-Sea. The proposed residence would be 2,315 square feet in size, and the project also includes a 590-square-foot garage/mechanical room and outdoor courtyards. The residence would be located on a previously-graded generally flat building pad located on the seaward side of a dome-like rocky hill or knoll, and would be accessed from Highway 1 along a previously graded driveway area. The project site consists of two two-acre parcels, with an existing scenic and conservation easement covering portions of both parcels. As part of the proposed project, the Applicant proposes to merge these parcels into one four-acre parcel.

The proposed project has a long CDP history. The Commission originally approved a CDP in 1977 for a 4,300-square-foot single-family residence on the site. The property owner at that time began grading and construction activities prior to meeting all of the required CDP conditions, and thus the work that was completed (and currently still exists on the site) is unpermitted, including the building pad and driveway mentioned above, along with other development (Violation files V-3-09-017 and V-3-13-0271). Ultimately, the then-property owner abandoned the project, and the residence approved in 1977 was never constructed. In 1999, the property was sold and the new owners applied to Monterey County for a CDP to construct an 8,270-square-foot two-story residence on the site with an underground garage, in the same general footprint as the 1977 Commission CDP approval. In January 2004, the County approved that project and the approval was appealed to the Commission. In September 2004, the Commission found that a substantial issue was raised with respect to the project's consistency with the County's Local Coastal Program (LCP) and took jurisdiction over the CDP application. In December 2004, the Commission approved, with conditions, a CDP for the project.<sup>1</sup> The Commission was sued over its CDP decision, and in December 2008, the Court of Appeal found that the Commission abused its discretion in approving the residence in environmentally sensitive habitat (ESHA) without making "takings" findings, and ultimately remanded the matter back to the Commission to re-hear the item consistent with the Court's decision. At that time, the property owners were not interested in pursuing the remand, and the application was placed in suspended status. Subsequently, in October 2009, the property owners notified Commission staff of their desire to proceed with the Court-ordered remand of the CDP application. That same month, Commission staff sent a letter to the property owners requesting clarifications and additional information as required by the Court remand in order to conduct a complete review of the proposed project and schedule the project for a Commission hearing. The property owners did not respond, and the matter again was placed in suspended status. In May 2014, the current Applicant purchased the property, and between 2015 and 2016 the Applicant submitted the required updates and information and is now proposing to develop the single-family residence and related development described above.

In the time since the Court's decision, the current Applicant provided updated biological and related information. The project site is located entirely in and adjacent to ESHA, including northern coastal bluff scrub habitat and individual occurrences of three special status plant species. The project proposes development that is prohibited in ESHA, that would remove ESHA, and that would adversely impact adjacent ESHA. Therefore, the proposed project is inconsistent with the LCP's ESHA provisions. The proposed project raises other coastal resource concerns that would probably be able to be addressed via conditions, but because of this fundamental LCP inconsistency, approval consistent with the LCP is not possible, and the LCP directs project denial in this case. However, consistent with the mandate of Coastal Act Section 30010, and since any economic use of the subject property would likely result in some degree of LCP inconsistency, staff recommends approval of a residential development to provide for a reasonable use of the property intended to avoid a potential unconstitutional taking of private property for public use.

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<sup>1</sup> The Commission ultimately adopted findings supporting the December 2004 decision following a revised findings hearing in May 2005.

Again, almost the entire property is ESHA, and a large portion is also protected by an existing easement (held by the State Coastal Conservancy) that protects the scenic and open space values of the property, as well as provides for public access and archaeological resource protection. Furthermore, another portion of the site is undevelopable rocky blufftop. As such, the site is highly constrained and the area for potential development is limited. The Applicant proposes to site the residence on the portion of the site that was originally graded by a previous owner back in the 1970s in order to limit additional ESHA impacts. That area is generally flat and degraded with little vegetation, and is located outside of the easement and rocky blufftop areas. This portion of the site is also located seaward of the knoll, and thus is also out of public view from Highway 1. In addition, the previously graded driveway area, which already provides access to the building pad area, is outside the existing easement area as well. With respect to coastal hazards, erosion rates provide for the site indicate that potential stability over time varies considerably. However, considering the unique facts and circumstances of this specific situation (development potential limited by existing easement and ESHA onsite; development proposal limited to existing graded area; assumption of hazards risks by Applicant), staff recommends that the Commission approve the proposed project with the proposed setback on the narrow basis of avoiding an unconstitutional taking of private property. Furthermore, the project is conditioned to prohibit future shoreline armoring and with requirements to remove and/or relocate potentially threatened development subject to defined triggers.

Residential (or any other type of development) on any other portion of the four-acre site would not be appropriate or allowable by the LCP or the existing scenic and conservation easement. The siting of the single-family residence on the most level, denuded, and topographically screened portion of the lot allows for a reasonable economic use of the property while ensuring that the project is as consistent as possible with ESHA, hazards avoidance, and visual protection policies of the LCP.

Thus, although the proposed development site is ESHA (as is the majority of the rest of the site), locating the development there and using the previously graded driveway alignment represents an appropriate compromise to maximize LCP consistency given the takings considerations and physical characteristics of the site. To further maximize consistency with the LCP's ESHA protection policies, the project is conditioned to require that all development, including grading, is located within a defined development envelope, thus ensuring that the residence is located in the minimum footprint necessary to protect ESHA, and is further conditioned to require all nonnative and invasive plants to be removed from within the development envelope and this area landscaped with native drought-resistant species. Outside of the development envelope, the project is conditioned to require the preparation and implementation of a habitat restoration plan for the site that involves restoration of the native habitats on the site in a way that also best preserves scenic values, and also requires recordation of a scenic and conservation easement for all portions of the property located outside of the development envelope that are not already covered by the existing scenic and conservation easement.

Further conditions require: leaving the driveway mostly unpaved and avoiding the use of ornate gates and other like entry features at Highway 1 to limit public view impacts; construction best management practices to protect offshore water quality; a pre-construction survey for the presence of nesting birds; a post-construction drainage and runoff control plan; protection and

maintenance of existing cypress trees on the site; water-conserving measures; protection measures for any identified archaeological resources; and, a public access easement to provide a future lateral California Coastal Trail segment on the seaward side of the highway.

As discussed above, violations of the Coastal Act exist on the subject property including, but not limited to grading of the building pad and driveway, installation of driveway gates, and other unpermitted development. Approval of this application pursuant to the staff recommendation, issuance of the CDP, and the Applicant's subsequent compliance with all terms and conditions of the CDP will result in resolution of the above-described violations.

Staff believes that the project, as conditioned, will allow a reasonable residential use (on a site that would otherwise prohibit residential use) while still protecting coastal resources as much as possible in light of takings considerations, and appropriately responds to the unique circumstances and challenges of this case. Thus, Staff recommends that the Commission approve the CDP subject to the recommended conditions. The motion is found on page 6 below.

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### APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contact with Agencies and Groups

### EXHIBITS

Exhibit 1: Regional Location Map

Exhibit 2: Parcel Map

Exhibit 3: Aerial Photo of Project Site

Exhibit 4: Site Photos

Exhibit 5: Proposed Project Plans

Exhibit 5a: Development Envelope

Exhibit 6: CDP A-174-77 (Sorenson)

Exhibit 7: Existing Scenic and Conservation Easement

Exhibit 7a: Existing Scenic and Conservation Easement Area

Exhibit 8: Project Site Habitat Map

Exhibit 9: Project Site Special Status Species Map

## I. MOTIONS AND RESOLUTIONS

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development, subject to the conditions in this staff report. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned in this staff report and adoption of the following resolution and findings. Conversely, failure of this motion would result in denial of the CDP application. 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-MCO-04-012 pursuant to the staff recommendation, and I recommend a yes vote.*

***Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-3-MCO-04-012 and adopts the findings set forth below on grounds that the development as conditioned is necessary to avoid a potential unconstitutional taking of private property while allowing for the proposed use. The development will otherwise be in conformity with Monterey County Local Coastal Program policies and Coastal Act access and recreation policies to the maximum extent possible. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

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

## III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Final Plans.** PRIOR TO ISSUANCE OF THE CDP, the Applicant shall submit two full size sets of Final Plans to the Executive Director for review and approval. The Final Plans shall be prepared by a licensed professional or professionals (i.e., architect, surveyor, geotechnical engineer, etc.), shall be based on current professionally surveyed and certified topographic elevations for the entire site, and shall include a graphic scale. The Final Plans shall be in substantial conformance with the proposed plans (titled “Kasler Point House” and dated received in the Coastal Commission’s Central Coast District Office February 22, 2017 (see **Exhibit 5**), except as further modified herein. The Final Plans shall clearly show the development’s siting and design, including through elevation and site plan views and shall comply with the following requirements:
  - a. **Approved Development Envelope.** All development (including all structural development, driveway, parking area, courtyards, walkways, leach field, landscaping, etc.), other than habitat enhancement and public access-related development, on the subject property shall be located within the development envelope as shown on **Exhibit 5a**. The remainder of the project site outside of the development envelope shall be restored to its native habitat condition pursuant to **Special Condition 4**.

- b. Height.** The residence shall extend no higher than 14 feet above average natural grade, and the two chimneys shall extend no higher than an 18 additional feet (for a total maximum height of 32 feet above average natural grade). The plans shall provide the detail necessary to ensure that this is the case.
- c. Driveway.** The driveway shall be in a double-track style with a vegetated median (consistent with the Habitat Restoration Plan required by **Special Condition 4**) and may not exceed 12 feet in width at any point. The 26-foot-wide turnout area and the driveway gutter shall be eliminated. The majority of the driveway shall be unpaved (i.e. no asphalt, concrete, or pavers), but small unconsolidated rock or gravel may be used for the driveway surface. The color of the driveway surface's rock and gravel shall match the existing soil present on the site to the greatest extent feasible. The portion of the driveway closest to Highway 1 with a grade greater than 15% may be paved with concrete with traction grooves. This concrete will also be colored to match the existing soil present on the site to the greatest extent feasible. Restoration work conducted on the site pursuant to **Special Condition 4** shall include plantings along the edges of the driveway that act to soften or screen it as much as possible.
- d. Gates.** The Final Plans shall show relocation of the Highway 1 entry gate westward to approximately the 115-foot contour line on the property. The gate must be of a muted earth tone or green color and of a see-through ranch-style design (e.g. cattle gate with minimal metal bars) to complement the surrounding natural environment. Gate height shall not exceed five feet. The second existing gate located across the portion of the existing driveway that is adjacent to the knoll must be permanently removed and the final plans must indicate as such.
- e. Foundation and Retaining Walls.** All foundation, garage, and retaining wall elements shall utilize standard basement, retaining wall, and foundation design (e.g., perimeter foundation with cross beams; slab on-grade, etc.); shall not utilize extraordinary measures (such as deep piers or caissons); shall not be designed or engineered (e.g. with concrete walls) to address ocean-related forces (e.g., wave attack, ocean flooding, erosion, etc.) except to the extent that such design may facilitate future removal of the foundation and associated structures; and shall be sited and designed consistent with standard engineering and construction practices in such a way as to best meet the objectives and performance standards of these conditions (including to facilitate removal if required – see **Special Conditions 7 and 8**). All foundation elements shall be sited and designed to be removable, including in terms of limiting extent of excavation or disturbance beyond the immediate development footprint, and including providing for modularity to the extent that it may facilitate removal of the foundation and associated structural development in response to an eroding shoreline.
- f. Landscaping.** All non-native and/or invasive plants within the development envelope, including iceplant, shall be removed and this area shall be kept free of such plants for as long as any portion of the approved development exists at this site. All landscaping must be located within the approved development footprint (see **Special Condition 1(a)** above) and shall consist of appropriate drought-resistant California native species. The remainder of the site outside the footprint is subject to the habitat restoration

requirements of **Special Condition 4**. All landscaped areas within the development envelope shall be maintained in a litter-free, weed-free, and healthy growing condition. All irrigation systems shall limit water use to the maximum extent feasible, including using irrigation measures designed to facilitate reduced water use (e.g., micro-spray and drip irrigation). No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be so identified from time to time by the State of California, and no plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be planted or allowed to naturalize or persist on the site.

- g. Grading.** The plans shall include a revised grading plan that limits all grading activities to the development envelope identified pursuant to **Special Condition 1(a)** above and the areas necessary to complete removal of the previously installed septic tank and other formerly-installed utilities.
- h. Drainage and Runoff Control.** A post-construction drainage and runoff control system shall be provided that is sited and designed: to collect, filter, treat, and direct all site drainage and runoff in a manner intended to protect and enhance coastal resources as much as possible; to prevent pollutants, including increased sediments, from entering coastal waters as much as possible; to filter and treat all collected drainage and runoff to minimize pollutants as much as possible prior to infiltration or discharge from the site; to retain runoff from roofs, , decks, courtyards, and other impervious surfaces onsite as much as possible; to use low impact development (LID) best management practices (BMPs) as much as possible; to be sized and designed to accommodate drainage and runoff for storm events up to and including at least the 85th percentile 24-hour runoff event (allowing for drainage and runoff above that level to be likewise retained and/or conveyed in as non-erosive a manner as possible).
- i. Public Access.** The Final Plans shall show the 10-foot-wide and approximately 160-foot-long voluntary lateral public access trail easement area on the Permittee's property (as shown in **Exhibit 5a**). This easement area shall align with the existing 10-foot-wide easement for underground conduits in the document recorded November 24, 1964 as Reel 376 pages 461 and 463 of Monterey County Official Records.
- j. Permanent Fencing Prohibited.** All permanent fencing on the site shall be removed and the Final Plans shall indicate that no permanent fencing is allowed on the property, either at the property lines or elsewhere, without an amendment to this CDP.
- k. Water Conservation.** The Final Plans shall include water conserving features, including at a minimum: on-demand water heaters, high-efficiency low-flush toilets, low-flow showerheads, and micro-spray or drip irrigation systems.

The Permittee shall undertake development in accordance with the approved Final Plans, unless the Commission amends this CDP or the Executive Director determines that no amendment is legally required for any proposed minor deviations. All requirements of the approved Final Plans shall be enforceable components of the CDP.

- 2. Construction Plan.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two copies of a Construction Plan to the Executive Director for review and approval. The Construction Plan shall, at a minimum, include the following:
- a. Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors (to the construction site and staging areas) in site plan view. All such areas within which construction activities and/or staging are to take place shall be minimized to the maximum extent feasible in order to have the least impact on public access and ocean resources, including by using inland areas for staging and storing construction equipment and materials as feasible.
  - b. Construction Methods.** The Construction Plan shall specify the construction methods to be used, including all methods to be used to keep the construction areas separated from public recreational use areas (including using inland areas for staging, storage, and construction activities to the maximum extent feasible), and including using unobtrusive fencing (or equivalent measures) to delineate construction areas, and including all methods to be used to protect the beach and ocean. All erosion control/water quality best management practices to be implemented during construction and their location shall be noted. The Plans shall limit construction activities to avoid coastal resource impacts as much as possible, including verification that equipment operation and equipment and material storage will not significantly degrade public views during construction to the maximum extent feasible.
  - c. Construction Requirements.** The Construction Plan shall include the following construction requirements specified by written notes on the Construction Plan. Minor adjustments to the following construction requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.
    - All work shall take place during daylight hours, and lighting of the beach and ocean area is prohibited.
    - Development in sandy beach areas is prohibited, except that removal of existing debris, concrete, rubble, etc., is allowed in these areas.
    - Construction (including but not limited to construction activities, and materials and/or equipment storage) is prohibited outside of the defined construction, staging, and storage areas.
    - Equipment washing, servicing, and refueling shall only be allowed at a designated inland location as noted on the Plan. Appropriate best management practices shall be used to ensure that no spills of petroleum products or other chemicals take place during these activities.
    - The construction site shall maintain good construction site housekeeping controls and procedures (e.g., clean up all leaks, drips, and other spills immediately; keep

materials covered and out of the rain, including covering exposed piles of soil and wastes; dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the beach; etc.).

- All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each workday. At a minimum, silt fences, or equivalent apparatus, shall be installed at the perimeter of the construction site to prevent construction-related runoff and/or sediment from entering the beach or ocean.
- All public recreational use areas impacted by construction activities shall be restored to their pre-construction condition or better within three days of completion of construction. Any native materials impacted shall be filtered as necessary to remove all construction debris.
- The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least three working days in advance of commencement of construction or maintenance activities, and immediately upon completion of construction or maintenance activities.

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

**3. Construction Site Documents & Construction Coordinator. DURING ALL CONSTRUCTION:**

- a. Construction Site Documents.** Copies of the signed CDP and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times, and such copies shall be available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the CDP and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.
- b. Construction Coordinator.** A construction coordinator shall be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and the coordinator's contact information (i.e., address, email, phone numbers, etc.) including, at a minimum, a telephone number and email address that will be made available 24 hours a day for the duration of construction, shall be conspicuously posted at the job site where such contact information is readily visible from public viewing areas at the same time as limiting public view impacts as much as possible, along with an indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the contact information (e.g., name, address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry.

4. **Habitat Restoration Plan.** PRIOR TO ISSUANCE OF THE CDP, the Applicant shall submit, for the review and written approval of the Executive Director, two copies of a Final Habitat Restoration Plan, prepared by a qualified resource specialist. The Final Habitat Restoration Plan shall provide for northern coastal bluff scrub, coastal scrub, and coastal sagebrush scrub habitat restoration and monitoring for all areas of the site outside of the approved development envelope and on the vegetated portion of the adjacent Caltrans right-of-way that fronts the Applicant's property and shall provide for, at a minimum, the following components:
- a. **Goals and Objectives.** Restoration shall be premised on creating or enhancing habitat so that it is self-functioning, high-quality habitat in perpetuity.
  - b. **Description of Existing Conditions.** Map and description of the existing habitat(s) that will be impacted by development, including all plant and wildlife species present, and any special status species.
  - c. **Proposed Restoration/Enhancement.** Map and description of the proposed restoration/enhancement.
  - d. **Non-Native and Invasive Plant Removal.** All non-native and/or invasive species shall be removed, and continued removal shall occur on an as-needed basis to ensure complete removal over time.
  - e. **Planting Plan.** The Final Habitat Restoration Plan must include a detailed planting plan emphasizing the use of seeds, plugs or container plants planted prior to fall rains, unless another time period or planting method is fully described and justified within the plan. All vegetation planted in the restoration areas shall consist of plants native to the northern coastal bluff scrub, coastal scrub, and coastal sagebrush scrub habitats and consist only of local genetic stock. The planting plan should be designed to avoid the use of irrigation following the stage of plant establishment. If irrigation is considered necessary to initiate restoration, it should be temporary and provisions for its removal must be included in the plan. Installation of all plants shall be completed prior to occupancy of the redeveloped residence.
  - f. **Special Status Species.** The known special status plant species on the site (seacliff buckwheat, ocean bluff milk vetch, and Monterey Indian paintbrush) impacted by the proposed project shall be replanted in the restoration area at a minimum 3:1 ratio. The design for the restored habitat shall include any special provisions deemed necessary to facilitate the survival and success of these special status species, and such provisions shall be consistent with applicable state and federal agency requirements for these species.
  - g. **Plant Maintenance.** All required plantings shall be maintained in good growing conditions for as long as any portion of the approved development exists at this site, and whenever necessary shall be replaced with new plant materials to ensure continued compliance with the approved plans.

h. **Monitoring and Maintenance.** Within 30 days of completion of native plant installation, the Permittees shall submit a letter to the Executive Director from the project biologist indicating that plant installation has taken place in accordance with the approved Final Habitat Restoration Plan, describing long-term maintenance requirements for the restoration, and identifying the five- and ten-year monitoring submittal deadlines (see **1.** below). At a minimum, long-term maintenance requirements shall include site inspections by a qualified biologist annually, or more frequently on the recommendation of the biologist, to identify and correct any restoration and maintenance issues.

1. Five years from the date of initial planting under the Plan, and every ten years thereafter, the Permittee or his successors in interest shall submit, for the review and approval of the Executive Director, a restoration monitoring report prepared by a qualified specialist that certifies that the on-site restoration is in conformance with the approved Plan, along with photographic documentation of plant species and plant coverage.
2. If the restoration monitoring report or biologist's inspections indicate the restoration is not in conformance with or has failed to meet the performance standards specified in the Restoration Plan approved pursuant to this permit, the Permittee, or his successors in interest, shall submit a revised or supplemental restoration plan for the review and approval of the Executive Director. The revised restoration plan must be prepared by a qualified specialist, and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan. These measures, and any subsequent measures necessary to carry out the approved restoration plan, shall be carried out in coordination with the Executive Director until the approved restoration is established to the Executive Director's satisfaction.

The Permittee shall undertake development in accordance with the approved Habitat Restoration Plan.

5. **Sensitive Bird Species.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, and for construction activities taking place between February 1st and August 31st that have the potential for significant noise impacts, the Permittee shall ensure that a qualified biologist shall conduct a preconstruction survey for the presence of nesting birds, including black swifts, at the project site. If an active nest of a Federal or State-listed threatened or endangered bird species, bird species of special concern, or any species of raptor is identified during such preconstruction surveys, or is otherwise identified during construction, the Permittee shall notify all appropriate State and Federal agencies within 24 hours, and shall develop an appropriate action plan specific to each incident that shall be consistent with the recommendations of those agencies. The Permittee shall notify the Executive Director in writing within 24 hours and consult with the Executive Director regarding the determinations of the State and Federal agencies. At a minimum, if the active nest is located within 250 feet

of construction activities (within 500 feet for raptors), the Permittee shall submit a report, for Executive Director review and approval, that demonstrates how construction activities shall be modified to ensure that nesting birds are not disturbed by construction-related noise.

6. **Monterey Cypress Trees.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall retain a certified arborist to conduct any site preparation activities requiring cuts or impacts to the root zone of the existing mature cypress trees on the site. The certified arborist shall monitor work within the root zone within a 25-foot radius from the trunk of the trees. The Permittee shall comply with methods identified by the certified arborist to avoid unnecessary damage to the trees' root zones, including use of hand tools as much as feasible within 25 feet of the trunk of the trees, protection and treatment of exposed roots during construction, and use of tunneling under shallow roots for utility installation in lieu of standard trenching.

In order to provide visual screening of the residence from Highway 1 in perpetuity, the existing Monterey cypress trees on the site shall be maintained in a healthy growing condition for the life of the project. In the event the Monterey cypress trees are damaged, die, or otherwise fail to provide adequate visual screening of the residence, the Permittee shall replant with new Monterey cypress trees as necessary to provide such visual screening.

7. **Coastal Hazards Risk.** By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards, including but not limited to waves, storms, flooding, landslide, bluff retreat, erosion, and earth movement, many of which will worsen with future sea level rise; (ii) to assume the risks to the permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.
8. **Coastal Hazards Response.** By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of himself and all successors and assigns, that:
  - a. **CDP Intent.** The intent of this CDP is to allow for the approved development to be constructed and used consistent with the terms and conditions of this CDP for only as long as it remains safe for occupancy and use without additional measures beyond ordinary repair and/or maintenance (all as articulated in this condition below) to protect it from coastal hazards (as these hazards are defined by **Special Condition 7** above). The intent is also to ensure that development is removed and the affected area restored under certain circumstances (including as further described and required in this condition), including that development is required to be removed, consistent with the Removal and Restoration Plan required in subsection (d) of this special condition.

- b. No Future Bluff or Shoreline Protective Device.** By acceptance of this Permit, the Permittee agrees, on behalf of himself and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-3-MCO-04-012 including, but not limited to, the residence, foundation, driveway, parking area, turnaround, walkways, decking, utilities, drainage facilities, or patios, including in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, liquefaction, bluff retreat, landslides, or other coastal hazards in the future, and as may be exacerbated by sea level rise. By acceptance of this Permit, the applicant hereby waives, on behalf of himself and all successors and assigns, any rights to construct such devices that may exist under applicable law.
- c. Removal and Restoration Plan.** The Permittee shall immediately submit two copies of a Removal and Restoration Plan (RRP) prepared by a licensed coastal engineer and geologist to the Executive Director for review and approval when any of the following criteria are met, which RRP shall also be implemented subject to all of the following:
- (i) **Unsafe Conditions.** If any portion of the approved development is damaged by coastal hazards (as these hazards are defined by **Special Condition 7** above), and if a government agency has ordered that the damaged portion of the approved development is not to be occupied or used, and if such government agency concerns cannot be abated by ordinary repair and/or maintenance, the RRP shall provide that all development meeting the “do not occupy or use” criteria is removed to the degree necessary to allow for such government agency to allow occupancy to the remainder of the development, if at all, after implementation of the approved RRP. For purposes of this special condition, “ordinary repair and/or maintenance” shall include sealing and waterproofing and repair and/or maintenance that does not involve significant alteration to the building’s major structural components, including exterior walls, floor and roof structures, and foundation (as those terms are defined in **Special Condition 8(c)(ii)**, below).
  - (ii) **Major Structural Components.** If any portion of the approved development’s major structural components (including exterior walls, floor and roof structures, and foundation) are subject to coastal hazards and must be significantly altered (including renovation and/or replacement) to abate those coastal hazards, then the RRP shall provide that such structural components be removed. For purposes of this special condition, “exterior wall major structural components” shall include exterior cladding and/or framing, beams, sheer walls, and studs; “floor and roof structure major structural components” shall include trusses, joists, and rafters; and “foundation major structural components” shall include any portion of the foundation and retaining walls.
  - (iii) **Daylighting.** If any portion of the approved foundation and/or subsurface elements becomes visible, then the RRP shall provide that such elements shall be screened consistent with the **Special Condition 1(f)** or, in the event that such screening is not possible, that all development supported by these elements, as well as the elements

themselves, that cannot be successfully screened as required be immediately removed.

- (iv) **Cantilevered Deck.** In the event that deployment of the cantilevered deck results in any portion of the deck extending beyond the bluff edge, the deck shall be modified (i.e. reduced in size) such that all portions of the deck are located inland of the bluff edge.
- (v) **Blufftop Recession.** In the event that the edge of the bluff recedes to within five feet of the residence, foundation, driveway, parking area, turnaround, walkways, utilities, drainage facilities, or courtyards but no government agency has ordered that the structures not be occupied, the RRP shall address whether any portions of the approved development are threatened by coastal hazards. The report shall identify all those immediate or potential future measures that could stabilize the development without bluff or shoreline protective device(s), including but not limited to removal or relocation of portions or all of the approved development.

In cases where one or more of the above criteria is met, the RRP shall be required to meet all requirements for all triggered criteria. In all cases, the RRP shall also ensure that: (a) all non-building development necessary for the functioning of the approved development (including but not limited to driveway/parking area and utilities) is relocated as part of the removal episode if necessary; (b) all removal areas are restored as natural areas consistent with this CDP; and (c) all modifications necessary to maintain compliance with the terms and conditions of this CDP, including the objectives and performance standards of these conditions, are implemented as part of the RRP. In all cases the Permittee shall provide 30 days' notice to the Executive Director prior to implementing the RRP.

If the Executive Director determines that an amendment to this CDP or a separate CDP is legally required to implement the approved RRP, then the Permittee shall submit and complete the required application within 30 days. The RRP shall be implemented immediately upon triggering of any of the listed criteria above, unless the Executive Director has identified that a CDP or CDP amendment is required for implementation. The Permittee shall undertake development in accordance with the approved RRP.

9. **Monterey County Requirements.** This action has no effect on conditions imposed by Monterey County pursuant to an authority other than the Coastal Act, except as provided in the last sentence of this condition. The Permittee is responsible for compliance with all terms and conditions of this coastal development permit in addition to any other requirements imposed by other local government permit conditions pursuant to the local government's non-Coastal Act authority. In the event of conflicts between terms and conditions imposed by the local government and those of this coastal development permit, such terms and conditions of this coastal development permit shall prevail.

## 10. Archaeological Resources.

In the event that any article of historical or cultural significance is encountered, all activity that could damage or destroy these resources must cease and the Executive Director and the Native American Heritage Commission must be notified so that the articles may be suitably protected or flagged for future research. An archaeological monitor qualified by the California Office of Historic Preservation standards and/or the Native American Heritage Commission shall be consulted in order to examine the site and obtain recommendations for subsequent measures for the protection and disposition of significant artifacts. Mitigation measures shall be developed and submitted to the Executive Director for review and approval that address and proportionately offset the impacts of the project on archaeological resources prior to recommencement of construction activity.

## 11. Public Access Easement.

A. PRIOR TO ISSUANCE OF THE CDP, the Permittee shall execute and record a document(s) in a form and content acceptable to the Executive Director irrevocably offering to dedicate to a public agency or private entity, approved by the Executive Director, a public access easement for public access and recreational uses in perpetuity in accordance with the terms of the Project Description as proposed by the Permittee. The easement shall encompass the 10-foot-wide and 160-foot-long area described in **Special Condition 1(i)** and generally depicted in **Exhibit 5a**. No development, as defined in Section 30106 of the Coastal Act, shall occur within the easement area except for the following development authorized by this coastal development permit.

1. Vegetation removal and planting in accordance with the final Habitat Restoration Plan required by Special Condition 4 of this CDP and future trail construction pursuant to coastal development permit review.

The recorded document shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the perimeter of the easement area prepared by a licensed surveyor based on an on-site inspection of the easement area.

- B. The offer to dedicate shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the property.
- C. The offer to dedicate shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner in perpetuity, and shall be irrevocable for a period of 21 years, such period running from the date of recording, and indicate that the restrictions on the use of the land shall be in effect upon recording and remain as covenants, conditions and restrictions running with the land in perpetuity, notwithstanding any revocation of the offer.

12. **Lot Merger.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall provide evidence from Monterey County that the two project parcels, known and described as “Assessor’s Parcel Numbers 243-251-012-000 and 243-251-013-000, being a portion of Lot 20, Rancho San Jose y Sur Chiquito,” have been merged and recorded as a single parcel of land. Documentation used to consolidate these two parcels shall be subject to Executive Director review and approval prior to recordation.
13. **Deed Restriction.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the properties governed by this CDP a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this CDP as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description of the legal parcel governed by this CDP. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the property so long as either this CDP or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the property.
14. **Open Space Conservation Easement.**
- A. No development, as defined in section 30106 of the Coastal Act, shall occur within an open space conservation area, which shall include those portions of the property not already burdened by the existing scenic and conservation easement on the site (see **Exhibit 7**) and also located outside the approved development envelope (see **Exhibit 5a**), except for removal of non-native vegetation, diseased or dead vegetation, habitat restoration (see **Condition 4**), or public access trails.
- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the Applicant shall execute and record a document(s) in a form and content acceptable to the Executive Director irrevocably offering to dedicate to a public agency or private entity, approved by the Executive Director, an open space and conservation easement for the purpose of visual resource protection, habitat conservation, and protection of any archaeological resources that may be present, in perpetuity.
- C. The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the easement area prepared by a licensed surveyor based on an on-site inspection of the easement area.
- D. The irrevocable offer to dedicate shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed.

E. The “offer to dedicate” shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner in perpetuity and shall be irrevocable for a period of 21 years, such period running from the date of recording, and the restrictions on the use of the land shall be in effect upon recording and remain as covenants, conditions and restrictions running with the land in perpetuity, notwithstanding any revocation of the offer.

#### **IV. FINDINGS AND DECLARATIONS**

In this de novo review of the proposed CDP application, the standard of review is the Monterey 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 at 36228 Highway 1, between Highway 1 and the ocean, on a granitic headland known as Kasler Point on the Big Sur Coast, approximately 10 miles south of the City of Carmel-by-the-Sea. The site is bounded by Highway 1 and a protected State Coastal Conservancy parcel to the east; the rocky shoreline, Abalone Cove, and the Pacific Ocean to the north and west; and a developed residential parcel, the rocky shoreline, and the Pacific Ocean to the south.

The site consists of two two-acre flag-shaped parcels that gently slope westward from Highway 1 toward the ocean before rising up to a dome-like rocky hill or knoll. For the purposes of this report, the parcels are described as the northern parcel (APN 243-251-013) and the southern parcel (APN 243-251-012). An approximately 6,000-square-foot generally flat building pad and concrete footings are located on the southern parcel on the seaward side of the knoll, at approximately 60 feet above sea level. Additional existing development on the site includes a 10-foot-wide unimproved driveway with a concrete gutter that extends from Highway 1 through the site to the building pad; two driveway gates (one at Highway 1 and one about halfway down the driveway); chain link fencing at the property line adjacent to Highway 1; drainage lines; a drop inlet and outlet; water lines; underground utility trenches; and a septic holding tank adjacent to the building pad.<sup>2</sup>

The southern parcel is zoned Rural Density Residential (RDR/40(14)) and the northern parcel is zoned Watershed and Scenic Conservation (WSC/40).<sup>3</sup> Both of these zoning districts allow for

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<sup>2</sup> All of the existing development on the property was installed by a previous owner in violation of the terms of an issued permit.

<sup>3</sup> The RDR zoning district allows for rural density and intensity uses in the rural and suburban areas of the County where adequate services and facilities exist or may be developed to support such development. For the portion of the project site zoned RDR, the maximum density is one unit per 40 acres. The RDR-zoned portion of the site is also restricted to a structure height of 14 feet, but the LCP allows exceptions to this height limit for chimneys, vents, and mechanical appurtenances. The purpose of the WSC zoning district is to allow development in the more remote or mountainous areas in the Coastal Zone while protecting the significant and substantial resources of those areas. The maximum density for the WSC-zoned project parcel is also one unit per 40 acres.

single-family development as a principally permitted use, provided that applicable resource protection policies can be met.

See **Exhibit 1** for a project location map, **Exhibit 2** for a parcel map, **Exhibit 3** for an aerial photo of the site, and **Exhibit 4** for additional site photos.

## **B. PROJECT DESCRIPTION**

The Applicant proposes to construct a 2,315-square-foot single-family residence. Additional proposed development includes a 195-square-foot internal covered courtyard, a 585-square-foot external courtyard, and a 590-square-foot below-ground garage and mechanical room. The proposed residence would be a 13-foot-tall single-story structure with a flat gravel roof and two 18-foot-tall chimneys, for a total project height of 31 feet. The residence would be primarily constructed of stone and wood materials, but the west-facing side of the residence would consist almost exclusively of windows with deployable wall-sized shutters. These shutters would fold down when the residence is occupied to function as decking. These temporary decks would extend 10 feet out from the structure and be cantilevered over the ground. The shutters would be raised up to cover the windows when the residence is not occupied.<sup>4</sup>

The residence would be located in the area of the existing graded building pad, i.e. on the seaward side of the knoll, and would require 245 cubic yards of cut and fill, mainly for the underground garage and mechanical room. The residence would be constructed with a concrete footing and slab foundation. The existing driveway alignment would remain but would be widened slightly to 12 to 15 feet with a 26-foot-wide turnout area about midway down the driveway. Most of the driveway surface, including a 2,110-square-foot parking area adjacent to the residence and an additional turnaround area, would be improved with large-scale open-joint stone pavers with gravel infill. The portion of the driveway nearest Highway 1 that has a grade greater than 15% will be paved with concrete with traction grooves.<sup>5</sup> A proposed walkway on the east side of the residence would also consist of large-scale open-joint stone pavers with gravel infill. All existing remnants of the previous development in the location of the proposed residence (i.e., the concrete footings and septic tank) would be removed. The proposed leach field and septic tank for the residence would be located under the driveway. All other utilities would extend to the residence from Highway 1 and would be located under the driveway.

The project includes drainage elements to address runoff from the roof of the residence, as well as runoff from pavers at the parking area and from the proposed walkway. Drywells would be installed to collect and disperse water underground from the roof, patios, and foundation drains to avoid surface runoff over the site.<sup>6</sup> An existing drop inlet located at the westerly end of the

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<sup>4</sup> The Applicant intends to use the proposed residence as a vacation home, and thus the residence would only be occupied on an occasional basis.

<sup>5</sup> The 12-foot width of the driveway, the turnaround area, and the concrete paving of the steep portion of the driveway are requirements of CalFire.

<sup>6</sup> Drywells are underground structures that disperse unwanted water, mostly stormwater and surface runoff. They are covered, porous-walled chambers that allow water to slowly percolate into the ground. A drywell receives water from one or more entry pipes or channels at its top and discharges the same water through a number of small exit openings distributed over a larger surface area in the side(s) and bottom.

driveway would outlet at an existing drainpipe over the rocky shelf. Driveway drainage is expected to percolate through the gravel infill in the open joints of the large-scale pavers.

The proposed project also includes merger of the Applicant's two two-acre parcels to result in one four-acre parcel. The project also includes a 10-foot wide and 160-foot long public access easement along the eastern edge of the property, in the location of an existing north-south utilities easement parallel to the highway. This easement area would allow for a future segment of the CCT on the Applicant's property that would be located at the base of the hillslope just below the highway. See **Exhibit 5** for the Applicant's proposed project plans.

### C. PROJECT HISTORY

In 1977, prior to certification of the Monterey County LCP, the Coastal Commission approved CDP A-174-77, which allowed for construction of a 4,300-square-foot single-family residence on the subject parcels.<sup>7</sup> That CDP included a number of conditions (see **Exhibit 6**), including requirements for: consolidation of the two parcels (prior to grading or construction); recordation of a scenic and conservation easement (prior to construction) over most of the northern parcel and portions of the southern parcel to protect scenic, natural, and archaeological resources on the site; submittal of grading, landscaping, and revegetation plans (prior to commencement of excavation activities) for Executive Director review and approval; removal of excavated materials; no exterior lighting visible from Highway 1; and a separate CDP for any future development within view of Highway 1. The Permittee, i.e. Mr. Sorenson, began grading and construction before satisfying at least one of the conditions (parcel consolidation), and then later abandoned the project. The development completed by Mr. Sorenson includes the previously mentioned approximately 6,000-square-foot nearly level excavated building pad and concrete footings on the seaward side of the knoll (i.e. between the knoll and the bluff edge), an unimproved approximately 450-foot-long and 10-foot-wide gravel driveway from Highway 1 to the building pad, a concrete gutter along a portion of the northern edge of the driveway, fencing along Highway 1, drainage lines, two storm drains, water lines, underground utility trenches, and a septic system. In total, approximately 15,000 square feet of disturbance occurred to install these project elements, which remain on the site. In addition, a gate at the Highway 1 entrance, as well as one approximately halfway down the driveway, was installed at some point. Because development occurred prior to all of the required conditions of CDP A-174-77 being met, the work that was completed and still currently exists on the site is in violation of CDP A-174-77. This and other violations on the subject property are discussed in more detail in Section H. below.

The scenic and conservation easement required by Special Condition 3 of CDP A-174-77 was accepted by the State Coastal Conservancy on March 11, 1983 and was recorded on May 11, 1983 (see **Exhibit 7**). This easement also protects archaeological resources in one area on the northern parcel and also ensures public access over much of the northern parcel.

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<sup>7</sup> The owner of the property in 1977 was Mr. Donald Sorenson. CDP application A-174-77 was approved on August 3, 1977 and the CDP was issued on August 4, 1977.

In 1999, Mr. Sheldon Laube and Dr. Nancy Engel purchased the property. In 2001, Mr. Laube and Dr. Engel applied to Monterey County for a CDP to construct an 8,270-square-foot two-story single-family residence on the site with a 1,824-square-foot underground garage (all in the same general footprint as the 1977 Sorenson approval) and to merge the two lots. On October 29, 2003, the Monterey County Planning Commission approved a CDP for the project and satisfied CEQA compliance by approving a Mitigated Negative Declaration (MND). Dr. Hugh McAllister, a downcoast neighbor, appealed the Planning Commission's approval to the County Board of Supervisors (BOS). On January 13, 2004, the BOS denied the appeal and approved the CDP and the MND.<sup>8</sup>

Dr. McAllister and two Coastal Commissioners appealed<sup>9</sup> the County's approval on February 18, 2004, at which time Dr. McAllister also filed a petition for writ of administrative mandate which was ultimately dismissed by the trial court and affirmed by the court of appeal. The appeals contended that the approved project was inconsistent with LCP policies related to environmentally sensitive habitat (ESHA), visual resources, geologic hazards, and water resources. The Commission heard the appeal on September 8, 2004 and took jurisdiction over the CDP for the project after finding that the County's approval raised a substantial issue with respect to all of the appeal contentions. On December 9, 2004, the Commission heard the application de novo. At that hearing, the Commission made changes to the staff recommendation with respect to Special Condition 1 and its related findings (related to visibility of the house from public viewing areas),<sup>10</sup> which necessitated a subsequent hearing on revised findings. On May 11, 2005, the Commission approved the revised findings for CDP A-3-MCO-04-012.

In January 2005, Dr. McAllister filed a second petition for a writ of administrative mandate with the trial court challenging the Commission's decision. Dr. McAllister asserted that the Commission's approval was improper given the purported violations on the site and that it was inconsistent with LCP requirements regarding the critical viewshed, ESHA, geologic resources, and hazardous areas. After the May 11, 2005 Commission hearing on revised findings, McAllister amended his writ petition to reflect the final approval. The trial court denied the petition in December 2006,<sup>11</sup> and Dr. McAllister subsequently appealed to the Court of Appeal.<sup>12</sup>

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<sup>8</sup> Monterey County Board of Supervisors Resolution No. 04-028 (PLN010105)

<sup>9</sup> CDP Appeal No. A-3-MCO-04-012

<sup>10</sup> The Commission deleted the requirement that the development not be visible from public viewpoints because it found that there was conflicting evidence on the question of whether or not the structure would be visible to the naked eye from Highway 1. The Commission found it unnecessary to definitively resolve the question of visibility from Highway 1 because the development would be almost or entirely screened by topography, i.e. the dome-like rocky knoll. The Commission did, however, limit the height of the structure to no more than 14 feet above average natural grade, consistent with the requirements of the LCP.

<sup>11</sup> Monterey County Superior Court (Superior Court No. M73043)

<sup>12</sup> During the legal proceedings, Laube and Engel submitted a request for an extension of the CDP approval on September 18, 2006 (A-3-MCO-04-012-E1). This extension request was granted by the Commission on March 14, 2007. Laube and Engel submitted a second extension request on December 3, 2007 (A-3-MCO-04-012-E2). On March 4, 2008, the appeals court granted a request for a stay of the CDP approval as of December 10, 2007 until resolution of the appeal.

On December 30, 2008, the Court of Appeal published its opinion in the case.<sup>13</sup> The Court found that the Commission abused its discretion in approving the house in ESHA without making any findings stating that it was approving the house in order to avoid a taking. The Court also upheld the Commission's decision not to require additional modifications to the house in order to keep it completely out of the public view. The Court remanded the case back to the Commission for the Commission to rehear the CDP application.

In October 2009, Mr. Laube and Dr. Engel notified Commission staff of their desire to proceed with the Court-ordered remand of the CDP application. On October 20, 2009, Commission staff sent a letter to Mr. Laube and Dr. Engel requesting clarifications and additional information<sup>14</sup> in order to conduct a complete review of the proposed project and schedule the project for a Commission hearing. The Applicants did not respond, and on May 20, 2014, Mr. Brandon Shui Ling Wang purchased the property. Mr. Wang, the current Applicant, is requesting a CDP under the same CDP application for the single-family residence described in the "Project Description" section above.

#### **D. BIOLOGICAL RESOURCES**

The Monterey County Local Coastal Program (LCP) acknowledges that the Big Sur coast supports a wealth and diversity of environmentally sensitive habitat areas (ESHAs) "perhaps unsurpassed in California." Accordingly, the LCP's ESHA provisions reflect the special nature of Big Sur's habitats and require the prioritization of their protection over development. As is the intention for all certified LCPs in California, the Monterey County LCP's ESHA policies stem from the Coastal Act's ESHA protection requirements, specifically Coastal Act Section 30240, which states:

*(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*

*(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

In other words, the certified Monterey County LCP ESHA policies at a minimum conform to and incorporate the ESHA policies and standards of the Coastal Act, including the development restrictions in Section 30240.

The introductory section of the Land Use Plan's (LUP's) ESHA chapter, mirrored in Coastal Implementation Plan (CIP) Section 20.145.020.EE (definition of ESHA), reflects and

<sup>13</sup> McAllister v. Cal. Coastal Comm'n (2008) 169 Cal.App.4th 912.

<sup>14</sup> The additional information requested included current project plans, additional biological resources information, confirmation of new staking and flagging of the project for visual resource evaluation, evidence of adequate water supply, and information relevant to a takings analysis, among other things.

incorporates into the LCP the Coastal Act requirement to limit development in ESHA to uses that are dependent on the resource:

*Environmentally sensitive habitats are areas in which plant or animal life or their habitats are rare or particularly valuable because of their special nature or role in an ecosystem. Environmentally sensitive habitats are also areas susceptible to disturbance or degradation by human activities and developments. Examples are riparian corridors and Areas of Special Biological Significance identified by the State Water Resources Control Board; rare and endangered species habitat; all coastal wetlands and lagoons; all marine wildlife haul-out, breeding and nesting area; education, research and wildlife reserves, including all tideland portions of the California Sea Otter State Fish and Game Refuge; nearshore reefs; tidepools; sea caves; islets and offshore rocks; kelp beds; indigenous dune plant habitats; Monarch butterfly mass overwintering sites; and wilderness and primitive areas. The California Coastal Act limits uses to those which are dependent on such resources; examples include nature education and research, hunting, fishing, and aquaculture.*

Consistent with the Coastal Act mandate, the following ESHA policies and implementation standards in the Big Sur LCP provide requirements for such resource-dependent uses in ESHA. The LCP also prescribes additional requirements for all other uses (i.e., non-resource dependent, such as a residence) that are adjacent to ESHA.

**LUP 3.3.1 ESHA Key Policy:** *All practical efforts shall be made to maintain, restore, and if possible, enhance Big Sur's environmentally sensitive habitats. The development of all categories of land use, both public and private, should be subordinate to the protection of these critical areas.*

**LUP ESHA Policy 3.3.2.1:** *Development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall not be permitted in the environmentally sensitive habitat areas if it results in any potential disruption of habitat value. To approve development within any of these habitats the County must find that disruption of a habitat caused by the development is not significant.*

**LUP ESHA Policy 3.3.2.2:** *Where private or public development is proposed, in documented or expected locations of environmentally sensitive habitats, field surveys by qualified individuals or agencies shall be made in order to determine precise locations of the habitat and to recommend mitigating measures to ensure its protection.*

**LUP ESHA Policy 3.3.2.3:** *The County shall require deed restrictions or dedications of permanent conservation easements in environmentally sensitive habitats when new development is proposed on parcels containing such habitats. Where development has already occurred in areas supporting sensitive habitat, property owners should be encouraged to voluntarily establish conservation easements or deed restrictions.*

**LUP ESHA Policy 3.3.2.4:** *For developments approved within environmentally sensitive habitats, the removal of indigenous vegetation and land disturbance (grading, excavation, paving, etc.) associated with the development shall be limited to that needed for the structural*

*improvements themselves. The guiding philosophy shall be to limit the area of disturbance, to maximize the maintenance of the natural topography of the site, and to favor structural designs which achieve these goals.*

**LUP ESHA Policy 3.3.2.7:** *Land uses adjacent to environmentally sensitive habitats shall be compatible with the long-term maintenance of the resource. New land uses shall be considered compatible only where they incorporate all site planning and design features needed to prevent significant habitat impacts, and where they do not establish a precedent for continued land development which, on a cumulative basis, could degrade the adjoining habitat.*

**LUP ESHA Policy 3.3.2.9:** *The County shall require the use of appropriate native species in proposed landscaping.*

**LUP ESHA Specific Policies – Marine Habitats - 3.3.3.B.1:** *Development on parcels adjacent to intertidal habitat areas should be sited and designed to prevent percolation of septic runoff and deposition of sediment.*

**LUP ESHA Specific Policies – Marine Habitats - 3.3.3.B.2:** *Alteration of the shoreline including diking, dredging, and filling, shall not be permitted except for work essential for the maintenance of Highway 1.*

**CIP Section 20.145.020.EE (Definitions):** *Environmentally sensitive habitat areas are areas in which plant or animal life or their habitats are rare or particularly valuable because of their special nature or role in an ecosystem. Environmentally sensitive habitats are also areas susceptible to disturbance or degradation by human activities and developments. Examples are riparian corridors and Areas of Special Biological Significance identified by the State Water Resources Control Board; rare and endangered species habitat; all coastal wetlands and lagoons; all marine wildlife haul-out, breeding and nesting area; education, research and wildlife reserves, including all tideland portions of the California Sea Otter State Fish and Game Refuge; nearshore reefs; tidepools; sea caves; islets and offshore rocks; kelp beds; indigenous dune plant habitats; Monarch butterfly mass overwintering sites; and wilderness and primitive areas. The California Coastal Act limits uses to those which are dependent on such resources; examples include nature education and research, hunting, fishing, and aquaculture. (Ref. LUP Section 3.3)*

**CIP Section 20.145.040.B.1:** *All development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall be prohibited in the environmentally sensitive habitat areas if it has been determined through the biological survey prepared for the project that the development's impact cannot be reduced to a level at which the long-term maintenance of the habitat is assured, (i.e. to an insignificant level). To approve any development within an environmentally sensitive habitat area, the decision making body must find that the disruption of such habitat caused by the development would not be significant. (Ref. Policy 3.3.2.1)*

**CIP Section 20.145.040.B.2:** *Deed restrictions or conservation easement dedications over environmentally sensitive habitat areas shall be required as a condition of approval for any*

*development proposed on parcels containing environmentally sensitive habitats. Where the proposed project is to occur on an already-developed parcel, restrictions or easement dedications shall still be required. Easements and deed restrictions shall be required according to the provisions of Section 20.142.130. (Ref. Policy 3.3.2.3)*

**CIP Section 20.145.040.B.3:** *Removal of indigenous vegetation and land disturbance, such as grading, excavation paving, and fill, on parcels containing environmentally sensitive habitats shall be limited to that necessary for the structural improvements and driveway access. Modifications to the proposal shall be made for siting, location, design, bulk, vegetation removal, and grading where such modifications will reduce impacts to the habitat. (Ref. Policy 3.3.2.4)*

**CIP Section 20.145.040.B.4:** *Development on parcels containing or within 100 feet of environmentally sensitive habitats, as identified on the current Big Sur Coast Environmentally Sensitive Habitat resource map, other resource information, or planner's on-site investigation, shall not be permitted to adversely impact the habitat's long-term maintenance, as determined through the biological survey prepared for the project. Proposals shall be modified for siting, location, bulk, size, design, grading vegetation removal, and/or other methods where such modifications will reduce impacts to an insignificant level and assure the habitat's long-term maintenance. Also, the recommended mitigation measures of the biological survey will be considered and made conditions of project approval. (Ref. Policy 3.3.2.4, Policy 3.3.2.7)*

**CIP Section 20.145.040.B.5:** *New land uses and new subdivisions on parcels within 100 feet of environmentally sensitive habitats, as identified on the current Big Sur Environmentally Sensitive Habitat resource map, other documented resource information, or through the biological survey process shall not be permitted where they will adversely impact the habitat's long-term maintenance, either on a project or cumulative basis. As such, a project shall only be approved where sufficient conditions of approval are available, such as for siting, location, design, size, and design which will mitigate adverse impacts to and allow for the long-term maintenance of the habitat, as determined through the biological survey. Also, a project shall only be approved where the decision-making body makes a finding that the project will not set a precedent for continued land development which, on a cumulative basis, could degrade the habitat. (Ref. Policy 3.3.2.7 and 3.3.2.8)*

**CIP Section 20.145.040.B.9:** *The use of native species consistent with and found in the project area shall be required in landscaping required as a condition of project approval. A list of appropriate native plant species is included as Attachment 4 (Ref. Policy 3.3.2.9)*

**CIP Section 20.145.040.C.2 Marine Habitats:** *a. Development on parcels adjacent to intertidal habitat areas shall be modified as necessary including for siting, location, design, and size where necessary to prevent percolation of septic runoff and deposition of sediment into the habitat. (Ref. Policy 3-3.3. B.1). b. Alteration of the shoreline, including diking, dredging, and filling, shall be prohibited. An exception shall be made for work essential for the maintenance of Highway 1. The maintenance work shall be subject to modifications and*

*conditions of approval designed to minimize project impacts. Such conditions of approval shall include recommendations contained in the biological survey prepared for the project and in the geological survey prepared for the project according to the requirements of Section 20.145.100.A. (Ref. Policy 3.3.3.B.2)*

In sum, the LCP restricts development in ESHA to resource-dependent uses, and only if such uses do not result in any potential disruption of habitat values. In other words, the LCP (like the Coastal Act) prohibits all other types of development in ESHA, and allows development adjacent to ESHA provided it is compatible with the long-term maintenance of the resource.

## **Analysis**

### *General Site Characteristics*

The two two-acre project parcels are located on the seaward side of Highway 1 on a marine terrace that slopes down to the rocky shoreline and the Pacific Ocean. The adjacent parcel to the south is currently developed with a single-family residence and the adjacent parcel to the east is an undeveloped two-acre California State Coastal Conservancy-owned parcel that is protected with a conservation easement. The most recent biological surveys of the site were conducted in May, November, and December 2016 by Fred Ballerini and a subsequent biological report was prepared on January 3, 2017. Multiple earlier surveys were conducted and reports prepared between 1999 and 2003, and again in 2009, for the previously-approved Laube and Engel residence.

The site is comprised of three primary habitat types: northern coastal bluff scrub, coastal scrub, and coastal sagebrush scrub (see **Exhibit 8**). The 2017 Ballerini report, which reviewed all of the previously prepared biological information for the site, states that no significant physical biological changes have occurred on the site since the 1999 report was prepared, with the exception of a slight expansion of invasive Hottentot fig (*Carpobrotus edulis*) and increased recruitment of coastal bluff scrub habitat into the existing graded driveway area. The 2017 report also states that the previous reports correctly identified the habitats on the site but they were not consistent with the current nomenclature for the natural communities. The descriptions below use the current nomenclature from the California Department of Fish and Wildlife's (CDFW's) 2010 Natural Communities List.

### *Northern Coastal Bluff Scrub Habitat*

Northern coastal bluff scrub is recognized as a threatened plant community by CDFW and is classified as a natural community "rare and worthy of consideration" in the California Natural Diversity Database (CNDDB). Northern coastal bluff scrub habitat (CDFW code 31.000.00) occupies the western portion of the two parcels and includes the footprint of the proposed residence. This habitat is characterized by plants of short stature and succulent-like foliage, including salt-tolerant species. The northern coastal bluff scrub habitat on the site supports bluff lettuce (*Dudleya farinosa*), California beach aster (*Corethrogyne filaginifolia* var. *californica*), lizard tail (*Eriophyllum staechadifolium*), Monterey Indian paintbrush (*Castilleja latifolia*), ocean bluff milk vetch (*Astragalus nuttallii* var. *nuttallii*), seacliff buckwheat (*Eriogonum parvifolium*), and other constituent species. Monterey Indian paintbrush and ocean bluff milk vetch are special status species, and seacliff buckwheat hosts a special status species (see further discussion of each of these species below). Hottentot fig (commonly referred to as iceplant) is also present and pervasive as a solid mat on the coastal bluff and rocky outcrops to the west and

north of the site of the proposed residence.

Seacliff buckwheat is a food and host plant for the federally-listed (endangered) Smith's blue butterfly (*Euphilotes enoptes smithi*), which has historically ranged along the coast from the Monterey Bay south to Punta Gorda in Ventura County, occurring in scattered populations. The project site is within this range; however, numerous surveys, conducted between 2000 and 2004, and again in 2009 and 2017, did not identify any Smith's blue butterflies on the site. The closest recorded sighting of a Smith's blue butterfly was approximately one-half mile to the north at Garrapata State Beach. However, as discussed in the Commission's 2005 staff report for the previous Laube and Engel project, because of the project site's location within the butterfly's range and the relatively close proximity to historic sightings to the north and south, it should be presumed that Smith's blue butterfly would make use of the site under the right conditions.

Monterey Indian paintbrush is a special status species that is included on List 4.3 (Plants of Limited Distribution – A Watch List) in the California Native Plant Society's (CNPS) *Inventory of Rare, Threatened, and Endangered Vascular Plants of California*. Ocean bluff milk vetch is similarly categorized on CNPS' List 4.2. **Exhibit 9** identifies observed locations of seacliff buckwheat, Monterey Indian paintbrush, and ocean bluff milk vetch on the site.

#### *Coastal Scrub Habitat*

Coastal scrub habitat (CDFW code 32.000.00) is categorized by the CNDDDB as being common, widespread, and abundant. Coastal scrub habitat generally occupies the flagpole portions of the two parcels as well as a portion of the northern parcel east of the knoll and is contiguous with that same habitat on the State Coastal Conservancy parcel to the east. This habitat on the site is co-dominated by lizard tail (*Eriophyllum staechadifolium*), poison oak (*Toxicodendron diversilobum*), Carmel ceanothus (*Ceanothus thrysiflorus* var. *griseus*), wood mint (*Stachys bullata*), coyote brush (*Baccharis pilularis*), California blackberry (*Rubus ursinus*), and other less dominant constituents including California sagebrush (*Artemisia californica*). None of these plants are listed as special status species. However, seacliff buckwheat is also found in the coastal scrub habitat on the site and, as discussed above, is a host plant for the federally-listed Smith's blue butterfly.

The existing driveway through the coastal scrub habitat is inundated with exotic vegetation, including the dominant cut-leaved plantain (*Plantago coronopus*) and other secondary exotics, including dog-tailed grass (*Cynosurus echinatus*), bur clover (*Medicago polymorpha*), ripgut brome (*Bromus diandrus*), wild mustard (*Hirschfeldia incana*), and Hottentot fig, but is also fringed with seacliff buckwheat individuals (see **Exhibit 9**).

#### *Coastal Sagebrush Scrub Habitat*

Coastal sagebrush scrub habitat (CDFW code 32.010.00, an alliance of coastal scrub) is categorized by the CNDDDB as being common, widespread, and abundant. The coastal sagebrush scrub habitat on the project site comprises a small area of the northern parcel on the eastern side of the knoll (see **Exhibit 8**). This small natural community is common along the Big Sur coast and is dominated by California sagebrush (*Artemisia californica*) and co-dominant shrub species including black sage (*Salvia mellifera*), poison oak, seacliff buckwheat, and California fuschia (*Epilobium canum*), as well as other less dominant herbaceous species.

### *Cypress Grove*

A small planted Monterey cypress grove flanks both sides of the existing driveway and extends slightly up the knoll approximately 200 feet west of the entrance gate (see photo in **Exhibit 4**). The cypress trees do not exceed 20 feet in height and lack understory vegetation. Monterey cypress trees are listed by the California Native Plant Society as a List 1B.2 species (rare, threatened, or endangered in California or elsewhere); however, the trees on the project site are outside their natural range and are introduced landscape plantings.

### *Special Status Animal Species*

The most recent 2017 survey did not identify any special status animal species on the site. Black swifts (*Cypseloides niger*), which are listed by the CDFW as a species of special concern, have the potential to occur on the project site because of the presence of sea caves on the shoreline. The project biologist conducted a survey on May 26, 2016 using high-powered binoculars while traversing the rocky shoreline with observations focused on one large sea cave and several smaller caverns. No presence was observed during the survey. In addition, the marine environment just offshore from the project site is in the middle of the range of the southern sea otter (*Enhydra lutris nereis*), which is listed as threatened by the Federal Endangered Species Act. Also, as discussed above, seacliff buckwheat is found in a number of locations on the project site and thus there is the potential for the federally-listed Smith's blue butterfly to occur on the site.

### *ESHA Determination*

The Commission's staff ecologist, Dr. Laurie Koteen, has reviewed the relevant project materials and has concluded that those portions of the site that are comprised of northern coastal bluff scrub habitat, listed as a threatened plant community by CDFW and classified as "rare and worthy of consideration" by the California Natural Diversity Database (CNDDDB), are ESHA. In addition, she determined that all constituents of the site with any special status plants (including individual plant occurrences) and potential for occupation by special status animal species are also ESHA. This includes all seacliff buckwheat, Monterey Indian paintbrush, and ocean bluff milk vetch plants on the site and those portions of the shoreline that have the potential to support black swifts. The Commission finds that these habitats constitute ESHA.

### *LCP Consistency*

The LCP's ESHA chapter is structured around the premise that ESHA (which encompasses species or habitats that are rare or particularly valuable because of their special nature or role in an ecosystem) may not be developed except for those things which are dependent on the ESHA. As described in the LCP, these "resource-dependent" uses may include "nature education and research, hunting, fishing, and aquaculture" (LUP introductory text and CIP Section 20.145.020.EE). Although not explicitly stated in the LCP, the Commission has also historically recognized such things as public access trails and habitat restoration efforts as being resource-dependent uses that are allowable in ESHA.<sup>15</sup>

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<sup>15</sup> The following is a non-comprehensive list of some of the projects the Commission has approved that include trail development through ESHA. The trails in these projects include paved and unpaved trails and boardwalks. Some provide pedestrian-only access, while others allow multi-use access, including bicycles and wheelchair access: CDP 2-07-018 (Sonoma County Regional Parks – multi-use path consisting of crushed rock, located in coastal scrub habitat containing sensitive plant species); CDP 3-01-101 (Del Monte Beach re-subdivision – boardwalk through dune habitat); 3-01-003 (Grover Beach Boardwalk – boardwalk through dune habitat); CDP 3-87-258

The introductory text of the LCP ESHA chapter is clear about the requirement that only resource-dependent uses are allowed in ESHA. Thus, the subsequent ESHA policies are only applicable for resource-dependent uses in the first instance, and not to all possible development or use types. For example, LUP Policy 3.3.2.1 states that “*Development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall not be permitted in the environmentally sensitive habitat areas if it results in any potential disruption of habitat value.*” This policy applies to vegetation removal, excavation, grading, filling, and construction related to development in ESHA that is resource-dependent, not to other uses in ESHA such as residences. In other words, resource-dependency is a precondition to considering whether a proposed development is consistent with the LCP’s ESHA policies; if the use is not resource-dependent, it is not allowable within ESHA. As such, the certified LCP appropriately incorporates the statutory requirements of Coastal Act Section 30240, and effectively prohibits non-resource dependent development (such as a residential house) in ESHA.

As proposed, the residence would be located entirely within the northern coastal bluff scrub habitat on the site (see **Exhibit 8**). Although mostly disturbed from past development on the site, the residence, parking area, and a portion of the driveway would remove a total of 0.2 acre (8,300 square feet) of the northern coastal bluff scrub on the site. In terms of individual species, according to the Applicant’s biological report, 264 individuals of seacliff buckwheat are present within the footprint of the proposed residence, 69 individuals are present along the driveway, and 85 individuals are present immediately adjacent to the proposed building footprint to the west. It is expected that construction activities and the development itself would remove all of these 418 individual seacliff buckwheat plants. In addition, nine Monterey Indian paintbrush individuals and 48 ocean bluff milk vetch individuals occur within the proposed building footprint and would be removed by construction. The project does not include any ESHA buffers given that the proposed project is situated directly in the ESHA on the site.

The proposed project is inconsistent with the LCP’s use limitations within ESHA. As described above, the LCP provides that within ESHA, only uses dependent on the resource are allowed. The proposed project would result in outright removal of 0.2 acre (8,300 square feet) of ESHA (northern coastal bluff scrub habitat), as well as removal of 475 individuals of special status plants (seacliff buckwheat, Monterey Indian paintbrush, and ocean bluff milk vetch), plus or minus, depending on the presence of these individual plants at the time of construction. The project is thus inconsistent with the fundamental ESHA policies of the LCP because the

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(Asilomar State Beach Boardwalk – boardwalk through dune habitat); CDP A-3-SLO-04-035 (PG&E Spent Fuel Storage – unpaved paths through coastal terrace prairie habitat); CDP 3-05-071 (Morro Bay Harborwalk – paved road and paved trail through dune habitat); CDP A-1-MEN-06-052 (Redwood Coast Public Access Improvements – unpaved paths through rare plant habitat and riparian habitat); 80-P-046-A1 (Humboldt County Public Works Subdivision – compacted gravel trail through riparian habitat); CDP 3-00-092 (Monterey Dune Recreation Trail and Parking Lot – paved multiuse path through dune habitat); CDP 1-07-005 (Crescent City Harbor Trail North Segment – Class I and Class III multiuse trails involving some wetland fill); CDP 3-97-062 (Sand City bike path – paved path through dune habitat); CDP 3-06-069 (Fort Ord Dunes State Park Improvements – unpaved path through dune habitat); CDPs 3-98-095 and 3-98-095-A1 (Elfin Forest Boardwalk – boardwalk through terrestrial habitat ESHA); CDP 6-06-043 (Otay River Valley Regional Park trails – decomposed granite trails through coastal sage scrub and wetland habitat); CDP 3-11-074 (City of Santa Cruz Arana Gulch Multiuse Trail – paved path through coastal prairie grassland, oak woodland, and a variety of wetland and stream habitats).

proposed residence would be located in a sensitive habitat type and would remove individuals of protected plant species, but is not a resource-dependent use. Such non-resource dependent uses in ESHA are prohibited by the LCP. While the LCP requires protection and preservation of sensitive habitats, the proposed project would have the opposite effect because it would eliminate such resources. Alternative siting and design would not make a residential development proposal approvable on any portion of the Applicant's parcels because the remainder of the parcels (i.e., outside the proposed development area) is subject to an existing scenic and conservation easement that precludes development (which was secured as a condition of approval for the prior project approved for this site which was never completed). However, even if no easement existed on the remainder of the property, it is likely that sensitive habitat and species (in particular, seacliff buckwheat) are present in these areas, which would raise the same problems of inconsistency with the LCP's ESHA requirements as the proposed project and thus preclude an alternatively-sited project proposal.

Even if the proposed project were to be an approvable use in ESHA, removal and permanent site coverage that precludes functioning habitat in the coverage area so long as the development is in place, as well as the fragmentation of the habitat due to the proposed development, is a direct and significant disruption of habitat value which is inconsistent with LCP policies (LUP ESHA Policy 3.3.2.1 and CIP Section 20.145.040.B.1). It would also be contrary to assuring the long-term continuance of these ESHA habitats by permanently removing and replacing the ESHA habitat with structural development.

The proposed project is also inconsistent with ESHA policies that require development adjacent to ESHA to be compatible with the long-term maintenance of the resource (LUP ESHA Policy 3.3.2.7 and CIP Sections 20.145.040.B.4 and 20.145.040.B.5). Even if the project were to be an approvable use in ESHA, it would directly abut remaining ESHA habitat on the site and in the immediately adjacent area without any buffer. The residence would introduce various disturbances and stresses that would, in both the short- and long-term, impact the long-term sustainability of the habitat communities, including both plants and wildlife.

The new 10-foot wide and 160-foot long public access easement portion of the proposed project (also sited in ESHA) is considered a resource-dependent use. Public access trails through sensitive habitat allow the public to experience and be in the resource, and thus, are an example of what is considered a "resource-dependent" use in ESHA. The trail is dependent on being in the ESHA to allow the public to experience and interpret it. As such, the public access easement, which would provide for a future trail through the property, would not be inconsistent with the LCP's ESHA protection provisions.

The lot merger portion of the project to merge the two parcels into one would not in and of itself be inconsistent with the LCP's ESHA policies because it does not include any specific development that has the potential to impact ESHA, but rather changes potential intensity of use of development. But because the proposed residential development is fundamentally inconsistent with the LCP's ESHA policies as described here, and the lot merger is only proposed for the purpose of facilitating development of the residence in the same application, it too cannot be found consistent with the LCP's ESHA provisions.

In sum, the LCP limits development within ESHA to resource-dependent uses, and because almost the entire site is ESHA with no feasible alternative siting configuration(s), the LCP

requires the Commission to deny the residential development proposed on the Applicant's parcels due to inconsistency with ESHA policies.

### **Conclusion**

The proposed project is located in and adjacent to ESHA, including northern coastal bluff scrub habitat and individual occurrences of three special status plant species (seacliff buckwheat, Monterey Indian paintbrush, and ocean bluff milk vetch). The project proposes development that is prohibited in ESHA, that would remove ESHA, and that would adversely impact adjacent ESHA. Therefore, the proposed project is inconsistent with the LCP's ESHA provisions.

## **E. VISUAL RESOURCES**

Protection of scenic resources in Big Sur is the top priority of the Big Sur Coast segment of the Monterey County LCP. The LCP's policies and standards afford the highest level of protection to the public viewshed by prohibiting all development that can be seen from major public viewing areas. However, the LCP also includes exceptions to this prohibition for certain areas and types of development. The following policies and standards apply to the proposed project.

**LUP 3.2.1 Key Policy:** *Recognizing the Big Sur coast's outstanding beauty and its great benefit to the people of the State and Nation, it is the County's objective to preserve these scenic resources in perpetuity and to promote the restoration of the natural beauty of visually degraded areas wherever possible. To this end, it is the County's policy to prohibit all future public or private development visible from Highway 1 and major public viewing areas (the critical viewshed), and to condition all new development in areas not visible from Highway 1 or major public viewing areas on the siting and design criteria set forth in Sections 3.2.3, 3.2.4, and 3.2.5 of this plan. This applies to all structures, the construction of public and private roads, utilities, lighting, grading and removal or extraction of natural materials.*

**LUP Policy 3.2.2.1 and CIP Section 20.145.020.V Definitions - Critical viewshed:** *Everything within sight of Highway 1 and major public viewing areas including turnouts, beaches and the following specific locations: Soberanes Point, Garrapata Beach, Abalone Cove Vista Point, Bixby Creek Turnout, Hurricane Point Overlook, upper Sycamore Canyon Road (Highway 1 to Pias Road), Pfeiffer Beach/Cooper Beach, and specific views from Old Coast Road as defined by Policy 3.8.4.4.*

**Exceptions to the Key Policy: LUP Policy 3.2.5 F. Rocky Point Area Vacant Parcels:** *Existing vacant residential parcels in the critical viewshed between Highway 1 and the sea, from (and including) the southernmost existing residential parcel on Rocky Point, to the northernmost developed residential parcel on Kasler Point and from the southernmost developed parcel north of Abalone Cove to the northernmost developed parcel south of Garrapata Creek shall be permitted to be used for residential purposes subject to policies of Section 3.2.4 of this plan and the following standards.*

*Additional standards shall include keeping driveways as narrow as possible, avoiding paving where practical and consolidation of driveways; the use of roof and surface treatments, colors and materials which will visibly blend with the surrounding environment; the use of berming*

*and other measures designed to minimize views of structures without blocking ocean vistas seen from Highway 1; prohibiting the dumping of excavated materials over the coastal bluff, and additions, antennae, night flood lighting, or other improvements in view of Highway 1 without separate permit consideration; and dedication of scenic easement over undeveloped portion of lot. Guest houses shall be attached to the main dwelling except where they can be sited to better implement these policies.*

**Exceptions to the Key Policy: LUP Policy 3.2.5.C.2 Highway 1 Facilities – Private Highway Improvements:** *Private driveway entrances, gates, roadside fences, mailboxes, and signs shall be of a design complementary to the rural setting and character of Big Sur, with preference for natural materials.*

**CIP Section 20.145.030 – Intent of Section:** *The intent of this section is to provide development standards which will allow preservation of scenic resources and promote the restoration of the natural beauty of visually degraded areas wherever possible. To this end, all future public or private development which would be visible within the "Critical Viewshed," as defined in Section 20.145.020.V., shall be prohibited. All development not visible within the "Critical Viewshed" shall be conditioned as to siting and design, as provided in the development standards of this chapter. "Development," as used in this section only, shall be considered to include all structures, the construction of public and private roads, utilities, lighting, grading and removal or extraction of natural materials. (Ref. Policy 3.2.1)*

**CIP Section 20.145.030.B.6 Exceptions for Development in the Critical Viewshed – Rocky Point Area Parcels:** *Within the "RDR" (Rural Density Residential) zoning district, existing vacant residential parcels in the critical viewshed between Highway 1 and the sea, from (and including) the southernmost existing residential parcel on Rocky Point, to the northernmost developed residential parcel on Kasler Point and from the southernmost developed parcel north of Abalone Cove to the northernmost developed parcel south of Garrapata Creek shall be permitted to be used for residential purposes subject to development standards in Section 20.145.030.C.2. The following standards shall apply:*

- b.** *Driveways kept as narrow as possible, shall avoid paving where practical, and shall be consolidated where possible;*
- c.** *Roof and surface treatments, colors and materials shall be natural and earth tone in order to blend with the surrounding environment;*
- d.** *Berming and other measures shall be used to minimize views of structures without blocking ocean vistas seen from Highway 1;*
- e.** *Dumping of excavated materials over the coastal bluff, structural additions, antennae, exterior lighting, or other improvements in view of Highway 1 shall be prohibited without separate permit consideration;*
- f.** *Scenic easements shall be dedicated over undeveloped portion of lot;*
- g.** *Development shall be modified as necessary for design, bulk, color, size, setbacks, materials, location, height, siting, or other methods in order to reduce the visual impact of the development. As well, regulations of the zoning district in which the parcel is*

*located may be modified as necessary in order to reduce visual impacts of development; and*

- h.** *Guesthouses shall be attached to the main dwelling except where they can be sited to better conform with these development standards. (Ref. Policy 3.2.5.F)*
- i.** *Driveway ingress and egress shall meet traffic safety requirements as provided by the Public Works Department and the California Department of Transportation, within the State Highway right-of-way.*

**CIP Section 20.145.030.B.6 Exceptions for Development in the Critical Viewshed – Highway 1 Facilities (Private Highway Improvements):** *Private driveway entrances, gates, roadside fences, mailboxes, and signs shall be of a design complementary to the rural setting and character of Big Sur. Such structures shall be composed of natural materials, including wood and stone. The design of all structures shall be subject to the approval of the Director of Planning as a condition of project approval. (Ref. Policy 3.2.5.C.2)*

**CIP Section 20.16.060.C Rural Density Residential Zoning District - Structure Height and Setback Regulations:** *The following structure height and setback regulations apply unless superseded by a structure height limit noted on the zoning map (e.g. "RDR/10(24)" would limit structure height to 24 feet), setback requirements when combined with a "B" district, setbacks shown on a recorded final or parcel map, or setback lines on a Sectional District Map. [emphasis added]*

**1.b. Maximum Height:** *30 feet*

**Sheet 29 of the Monterey County Zoning Map:** parcel is zoned RDR/40(14) [emphasis added]

**CIP Section 20.62.030.A – Height and Setback Exceptions:** *Chimneys, vents, and mechanical appurtenances may be erected to a greater height than the limit established for the district in which the structure is located.*

### **Analysis**

The LCP defines the “critical viewshed” in Big Sur as everything within sight of Highway 1 and major public viewing areas, and prohibits all development that is visible from these locations. It also provides exceptions to this prohibition for certain areas and certain types of development, thereby acknowledging such existing areas and types of development that were and could continue to be in the critical viewshed. These “exception areas” include existing rural service areas (such as Big Sur Valley, Lucia, and Gorda) and existing residential subdivisions at Rocky Point and Otter Cove. The LCP also includes critical viewshed exceptions for certain uses and types of development, including private highway improvements such as driveway entrances, gates, roadside fences, and mailboxes.

### *Site Location*

The project site is located on the seaward side of Highway 1 in northern Big Sur in a pocket of residential development between Garrapata State Beach to the north and the Rocky Point Restaurant to the south (see **Exhibit 1** for regional location map). The parcels are directly in the highway viewshed and can also be seen from the Abalone Cove Vista Point turnout located just

upcoast from the property. A vegetated rocky knoll, which rises approximately 110 feet above sea level, is the most visible feature of the site from the highway and the turnout, and the existing unpaved driveway and two gates can also be seen from these vantage points. The existing graded building pad is not visible from public viewing areas because of its location on the seaward side of the knoll. See photos of the site in **Exhibits 3 and 4**.

The LCP defines the Rocky Point exception area as “existing vacant *residential* parcels in the critical viewshed between Highway 1 and the sea, from (and including) the southernmost existing residential parcel on Rocky Point, to the northernmost developed residential parcel on Kasler Point and from the southernmost developed parcel north of Abalone Cove to the northernmost developed parcel south of Garrapata Creek.” This definition excludes two parcels at Abalone Cove from the exception area because they are designated and zoned Watershed and Scenic Conservation (WSC) which is a non-residential land use and zoning designation. The exception area parcels, on the other hand, have a land use and zoning designation (Rural Density Residential - RDR) that specifically allows for residential use.

The project site’s northern parcel (APN 243-251-013) is one of the two WSC-zoned parcels at Abalone Cove that was not included in the Rocky Point critical viewshed exception area. The project site’s southern parcel (APN 243-251-012) is that “northernmost developed residential parcel on Kasler Point” that is included in the exception area definition.”<sup>16</sup> As such, one of the project site’s parcels is in the Rocky Point exception area (the southern parcel) and the other parcel is outside of the exception area (the northern parcel). However, the portions of both of these two parcels that are visible from the Abalone Cove Vista Point turnout on Highway 1 are mostly covered by an existing scenic and conservation easement that was required by Special Condition 4 of the 1977 Sorenson CDP (CDP A-174-77). The easement, which was recorded on May 11, 1983, covers most of the northern WSC-zoned parcel and those portions of the southern RDR-zoned parcel that are located along the immediate rocky shoreline. As illustrated in **Exhibits 7 and 7a**, the easement allows limited and controlled public access to most of the northern parcel with the exception of the archaeological site. On the southern parcel, the easement specifically excludes the flat development envelope area west of the rocky knoll as well as the driveway area, as shown in **Exhibit 7a**.

#### *LCP Consistency*

The proposed residence would be located on the seaward side of the rocky knoll in the existing graded building pad area.<sup>17</sup> This existing graded area is mostly on the southern parcel, and a small portion of the northeast corner of the house would extend onto the northern parcel, in an area of that parcel that is not covered by the easement. The driveway and gate would be located

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<sup>16</sup> At the time of LCP certification in 1986, Mr. Sorenson had already graded the driveway and building pad and installed the few utilities that still exist on the site today. As such, the southern parcel was considered “developed” but still vacant, and accordingly, was included in this Rocky Point critical viewshed exception area. By 1986, the northern parcel had already been placed entirely in a conservation easement as a condition of CDP A-174-77. Given this and the fact that the northern parcel is highly visible from the Abalone Cove lookout, this parcel was not included in the exception area parcels when the LUP was certified. It is worth noting that in 2008 the court in *McAllister v. CCC* concluded that the CCC did not err in previously finding the southern parcel to be within the Rocky Point exception area. Staff recommends that the Commission now make the same finding again here.

<sup>17</sup> The proposed residence would be in the same location on the site as both the previously approved Sorenson residence as well as the previously proposed Laube and Engel residence.

entirely on the southern parcel, also outside the easement area. As such, the majority of the proposed project would be located on the southern parcel, within the Rocky Point critical viewshed exception area. See **Exhibit 5** for project plans and **Exhibit 7a** for a graphic depiction of the easement areas.

The LCP requirements for the Rocky Point exception area parcels, which are less restrictive than the normal LCP requirements, include the use of treatments, colors, and materials that cause the development to visibly blend with the surrounding environment; the use of measures to minimize views of structures without blocking ocean views from Highway 1; keeping driveways as narrow as possible; the dedication of scenic easements over undeveloped portions of the lot; and attaching guesthouses to the main dwelling unit (LUP Policy 3.2.5.F and CIP Section 20.145.030.B.6). Structures in the Rocky Point exception area have a maximum height limit of 14 feet with exceptions for chimneys, vents, and mechanical appurtenances. The portion of the northern parcel that is not in the exception area is subject to the LCP's prohibition against development in the critical viewshed (LUP Key Policy 3.2.1 and CIP Section 20.145.030).

The proposed 2,315-square-foot single story structure and the 590-square-foot garage/mechanical room would extend to a height of 13 feet (or 74 feet above sea level). The two proposed chimneys would extend an additional 18 feet<sup>18</sup> above the residence, for a total structural height of 31 feet (or 92 feet above sea level), which is below the crest of the 110-foot-tall knoll, as illustrated in **Exhibit 5 (page 3 of 5)**, and also below the existing planted cypress grove on the southern slope of the knoll (see **Exhibit 4**). The proposed development (minus the proposed chimneys) was staked and flagged by the Applicant in July 2016 and Coastal Commission staff visited the site on September 15, 2016. Staff observed the site from multiple vantage points, including from Highway 1 and the Abalone Cove turnout, and no staking or flagging was visible from these locations. The proposed flat roof and low profile of the residence, combined with the ability of the knoll and the cypress trees to provide screening, would allow the residence to be constructed in a manner that is out of view from public vantage points. Although the two proposed chimneys extend an additional 18 feet above the residence, they too are not expected to be visible due to the gradient of the knoll and tree screening.

Even if some portion of the residence was visible from these locations, the southern parcel is in the critical viewshed exception area and is not subject to the LCP's strict "no visibility" standard. As such, the residence would be consistent with the LCP's critical viewshed exception area policies and standards that require blending of development into the environment and screening with topography to minimize visibility. In addition, the residence would be located on the least visible portion of the site, meeting the exception area requirement to do just that. Given that the proposed structure is in fact not visible from public vantage points, it meets the visual policies and standards of the critical viewshed exception area easily. The small northeast corner of the structure that would be located on the northern parcel is subject to the LCP's more stringent critical viewshed restrictions. But like the rest of the structure, this corner of the residence would not be visible from any public vantage points, and therefore does not run afoul of the LCP's prohibition against development in the critical viewshed.

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<sup>18</sup> The Applicant has indicated that, due to the proposed location of the residence adjacent to the knoll, the 18-foot tall chimneys are necessary to ensure adequate air flow and smoke dispersion up and away from the house.

However, over time the existing cypress trees, which provide some screening of the development, will die, be damaged, or grow in a manner such that some residential development may become visible. Although the southern portion of the site and the majority of the proposed structure are not subject to the strict “no visibility” standard, the exception area policy still requires the use of measures to minimize views of structures from Highway 1. As such, the potential loss of the screening provided by the cypress trees, thereby exposing previously unseen development, raises a consistency issue with this policy. The project as proposed does not protect against the likely future loss of this screening measure.

The Applicant proposes to retain the existing metal ranch-style Highway 1 entrance gate.<sup>19</sup> Such private gates are allowed by the LCP in the viewshed provided they are of a design complementary to the rural setting and character of Big Sur, with a preference for natural materials. The simple metal cattle-type gate is similar in style and appearance to those of working ranches in Big Sur and is consistent with the rugged and functional aesthetic of the area. However, the gate is situated prominently at the edge of the highway at a highly visible location (see **Exhibit 4**). For travelers moving north on Highway 1, the view through the existing gate is the first unobstructed ocean view after passing a half-mile-long residential section of the highway that affords little to no views of the ocean or shoreline because of fencing, landscaping, and other development. Although the gate itself is consistent with LCP design and style requirements, it is not consistent with the specific LCP requirements for the Rocky Point Area parcels to modify development to reduce its visual impact and minimize views of development. The gate is directly in view at an important location in the public viewshed and it clutters existing shoreline and blue water views, and would not best meet LCP minimization requirements.

The proposed driveway, located down the narrow flagpole portion of the southern (critical viewshed exception area) parcel, would be visible from public vantage points. Rocky Point exception area Policy 3.2.5 requires driveways to be kept as narrow as possible and unpaved where practical. The driveway would follow the existing driveway alignment through the site and would be mostly constructed of large-scale open-joint stone pavers with gravel infill,<sup>20</sup> and the stone and gravel is proposed to match the coloring of the existing rock on the site. The driveway would vary in width from 12 to 15 feet with one approximately 26-foot-wide turnout area.<sup>21</sup> An existing concrete drainage gutter would remain along the northern edge of the driveway.

As proposed, the driveway raises consistency issues with the LCP’s requirement to keep driveways as narrow as possible. Specifically, given that ample turnaround and parking area would be provided adjacent to the residence itself as part of the project and that a driveway such as this is not required to provide two-way ingress and egress, a 12-foot-wide driveway is

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<sup>19</sup> The Applicant proposes to remove a second existing gate that is located partway down the driveway.

<sup>20</sup> Except that the portion of the driveway nearest Highway 1 that has a grade greater than 15% will be paved with concrete with traction grooves, per the requirements of CalFire.

<sup>21</sup> Again, CalFire requires a minimum 12-foot driveway width. The 26-foot-wide driveway turnout area located approximately midway down the driveway is separate from the turnaround area that is located in the general vicinity of the proposed residence (again, this turnaround area (but not the driveway turnout area) is required by CalFire).

considered the minimum necessary for residential access. The portions of the proposed driveway that exceed this 12-foot width (particularly the 26-foot-wide turnout portion) are not consistent with LCP Policy 3.2.5's requirement to keep driveways as narrow as possible. In addition, the proposed pavers would not be consistent with this same policy's requirement to avoid paved driveways where practical. The existing driveway has been unpaved for many years in a double-track style (i.e., two tire track lines with a vegetated median) and, as seen in **Exhibit 4**, blends well with the surroundings. Thus it appears practical to maintain an unpaved driveway to serve the proposed residence.

#### *Conclusion*

In summary, the proposed residence has been sited and designed such that the rocky knoll and existing trees would effectively screen it from public view. However, over time, the trees could become damaged, could die, or could grow in a manner such that previously unseen residential development becomes visible, inconsistent with the LCP's requirements to minimize views of structures as seen from Highway 1. Also, the proposed gate and driveway have not been designed for minimum visibility, and in particular for the driveway, to be as narrow as possible. Furthermore, the proposed driveway would be paved even though it appears that it is practical to avoid such paving over most of the driveway. Therefore, the project as proposed is consistent in part with LCP visual policies specifically related to the proposed residence; however, the project is inconsistent in part with LCP visual policies specifically related to the residence in the long term, as well as the gate and driveway. These inconsistencies can be addressed through conditions of approval. (*See "Takings" section below for further discussion.*)

## **F. PUBLIC ACCESS**

Coastal Act Section 30604(c) requires that every CDP issued for any development between the nearest public road and the sea "shall include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3." The proposed project is located seaward of the first through public road (Highway 1). The following cited Coastal Act sections are applicable to the project.

***Section 30210.** In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211.** Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

***Section 30212.(a)** Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway. ...*

**Section 30214.** (a) *The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following: (1) Topographic and geologic site characteristics. (2) The capacity of the site to sustain use and at what level of intensity. (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses. (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.*

(b) *It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. ...*

Consistent with public access policies contained within the Coastal Act, the Monterey County LCP also requires that public access be protected and maximized through a variety of policies, including:

**LUP Key Policy 6.1.3:** *The rights of access to the shoreline, public lands, and along the coast, and opportunities for recreational hiking access, shall be protected, encouraged and enhanced.*

*Yet because preservation of the natural environment is the highest priority, all future access must be consistent with this objective. Care must be taken that while providing public access, the beauty of the coast, its tranquility and the health of its environment are not marred by public overuse or carelessness. The protection of visual access should be emphasized throughout Big Sur as an appropriate response to the needs of recreationists. Visual access shall be maintained by directing all future development out of the viewshed. The protection of private property rights must always be of concern.*

**LUP Policy 6.1.4.1:** *Overall, the best locations for public access to the shoreline, public lands and along the coast are already in use or have been used in the past. Major access areas, whether in public or private ownership, shall be permanently protected for long term public use. These should be improved and managed properly by designated public or private agencies; furthermore, the County will require the preparation and implementation of access management plans for all accessways on the property or within the Park unit before new locations are opened on any particular ownership. Such access management plans shall address intensity of use, parking, protection of fragile coastal resources, maintenance, etc.*

**LUP Policy 6.1.4.5:** *Bluff top and lateral access is appropriate in many areas along the coast. These opportunities shall be protected for long term public use, subject to adequate management programs, the development of which is an implementation activity.*

**LUP Policy 6.1.4.6:** *Trails should be located in areas able to sustain public use without damage to natural resources or other conflicts. Therefore, new and existing trails should be sited or rerouted to avoid safety hazards, sensitive habitats, and incompatible land uses.*

**LUP Policy 6.1.5.A.2 – Shoreline Access Priorities:** *The second priority for improvement of public accessways should be placed on areas that have ample beaches, minimal public safety hazards, and either absence of sensitive habitats or habitats that can be protected from adverse impacts. Priority 2 areas are: **Kasler Point**, Rocky Point (B)\*, Palo Colorado (B), Bixby Creek, Point Sur, False Sur - Swiss Canyon, and Gamboa Beach. [emphasis added]*

**LUP Policy 6.1.5.C.1 – Providing and Managing Trails:** *Trail corridors shown in the Trails Plan Map are recommended as public access routes to public lands or other destinations. Where trails already exist, alignments should remain the same, except where rerouting would be feasible to reduce adverse environmental or visual impacts. The siting of new trails shall require field inspection and environmental review.*

**LUP Policy 6.1.5.C.2 – Providing and Managing Trails:** *The Trails Plan Map recommends a continuous trail system along the Big Sur coast. In developing this trail, lands already in public ownership or proposed for public acquisition should be used wherever possible in preference to private property. The shoulders of public roads should be used where essential to bridge gaps where a trail elsewhere is not feasible because of hazardous conditions, terrain, or existing concentrations of development. This occurs along sections of Highway 1, the Old Coast Road, and Sycamore Canyon Road. In general, sections of the trail along the Highway should be kept to a minimum to ensure the safety of pedestrians and motorists. ....*

**LUP Policy 6.1.5.C.4 – Providing and Managing Trails:** *Where specific trail alignments have not been identified but where the property of concern is within a trail corridor, a general offer of dedication will be required consistent with the standards for trail corridors in the area. Precise trail alignments will be agreed upon at a future time through cooperation between the landowner and the public agencies with responsibility for constructing and maintaining the trail.*

**LUP Policy 6.1.5.G.1 – Land Use Compatibility Criteria:** *New development shall not encroach on well-established accessways nor preclude future provision of access.*

**CIP Section 20.145.150.C.3 – Access Location and Distribution Standards – Upland Trail:**

*a. The Upland Trail standard shall apply to oceanfront parcels, parcels containing or potentially providing access to shorefront bluff and/or scenic overlooks, and to parcels further inland which may provide a link between recreational areas and the shoreline.*

*b. Upland trails shall be located to provide continuous pedestrian and/or equestrian access for passive recreational use along a shoreline bluff or along the coast inland from where beach access opportunities are severely limited or nonexistent.*

*c. Upland trails shall be located to provide a connection between the shoreline and inland units of the federal, state, or local park systems, between shoreline access easements, or between the road and a scenic overlook.*

***CIP Section 20.145.150.D.4 – Access Requirement:** An offer of dedication shall be required, in lieu of an easement, if the exact location of the public accessway remains to be determined and/or if the County will not be responsible for the accessway's eventual improvement and management. To meet the condition, the offer of dedication to a public or nonprofit agency must be approved by the Board of Supervisors as valid for a period of 21 years, and recorded with the County Recorder in accordance with Section 20.142.130.A.6. The Planning Department shall place one copy of the offer in the project file, and the other copy in the Planning Department easement file. The offer shall also be mapped on Planning Department trails and easement maps. The offer shall be transmitted to the California Coastal Commission, who will hold the offer for the duration of the offer period.*

### **Analysis**

The Big Sur Area LCP acknowledges the essential nature of coastal access and inland area trails to the public's enjoyment and appreciation of Big Sur's scenic and wild character. The LCP includes priority shoreline access locations (of which Kasler Point is within the second level) and also includes a trails plan map for the entirety of Big Sur that recommends a continuous trail system along the Big Sur coast. Like the Coastal Act, LCP provisions require the rights of access to the shoreline, public lands, and along the coast to be protected, encouraged, and enhanced.

The project site is located on the granitic headland known as Kasler Point. The existing Abalone Cove highway turnout immediately to the north of the property provides public parking for approximately eight to nine vehicles. From the turnout, a series of actively-used trails provide access over the adjacent State Coastal Conservancy (SCC) parcel and down to the small rocky beach at Abalone Cove. From here, the SCC trails connect to trails located on the northern and southern parcels of the project site. Some of these trails are located in areas that are covered by the existing scenic and conservation easement, which allows for public access in the easement area (see **Exhibit 7**).<sup>22</sup> The existing easement trails provide coastal public access both on the property and in the surrounding area generally, and the proposed project does not include any elements that would interfere with the trails located in the easement area. Other trails (i.e. "volunteer" trails) exist on the property outside of the easement area, including trails in the area of the existing graded building pad, i.e. the location of the proposed residence.

The project site fronts Highway 1, which is the current de facto through north-south California Coastal Trail (CCT) route in the project area. The CCT through Big Sur is currently comprised of a mix of disconnected segments, and where there is no actual north-south trail, Highway 1 acts as the de facto route for pedestrians and bicyclists. As described above, the LCP recommends a continuous trail along the Big Sur coast and provides preferred trail corridor routes, noting that sections of the trail along the highway should be kept to a minimum to ensure the safety of pedestrians and motorists. To realize this vision of a continuous and connected CCT along the Big Sur Coast, the LCP encourages trail easements through private land in accordance with the trails map. For the project area, the LCP envisions that the CCT will be located along and

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<sup>22</sup> The Commission required a conservation and scenic easement over most of the northern parcel and some of the southern parcel of the project site as part of its approval of CDP A-174-77. The primary purpose of this easement was protection of the viewshed, but the easement was also required to provide for protection of plants, wildlife, and archaeological resources and to allow for public access on the site. The easement was accepted by the SCC on March 11, 1983 (and recorded on May 11, 1983).

adjacent to the Highway 1 corridor.

The Applicant does not propose to maintain or allow access to the existing “volunteer” trails on the property because of their location in the vicinity of the proposed residence. However, the Applicant has offered to dedicate a 10-foot-wide lateral public access easement in the location of an existing north-south utilities easement on the property parallel to the highway. This utility easement is located adjacent to the seaward side of the highway right-of-way and extends a total length of 160 feet (see **Exhibit 5a**). This easement area would allow for a future segment of the CCT on the Applicant’s property that would be located at the base of the hillslope just below the highway. This future CCT segment would connect to the SCC-owned parcel to the north and any future lateral CCT segment located on that property. This offer-to-dedicate across the Applicant’s property would provide for more possible CCT siting options in the future (e.g., if a connecting easement was secured at some point on the downcoast property), furthering the LCP goal of developing a connected CCT in Big Sur.

In sum, the existing public recreational access in the easement area on the Applicant’s property provides a much-used resource for the public to access this location on the Big Sur coast. The proposed project would not hinder, block, or otherwise degrade this existing access amenity within the existing easement area, and is thus consistent with LCP requirements to maintain and protect existing access. The proposed project is also consistent with LCP policies that recommend a continuous coastal trail through Big Sur. The proposed 160-foot-long north-south lateral offer-to-dedicate an easement that is part of this project application would further the public access opportunities at this location and represents one step closer to a realized through north-south Coastal Trail in Big Sur.

#### *Conclusion*

The existing scenic and conservation easement allows for public access across much of the Applicant’s property. A new, additional trail easement adjacent to the highway right-of-way would augment this existing access and provide for a future north-south segment of the California Coastal Trail that is separated from the highway. As such, the project as proposed is consistent with the above-cited Coastal Act and LCP policies that encourage and protect maximum public access. (See “Takings” section below for further discussion.)

## **G. COASTAL HAZARDS**

The Monterey County LCP is premised on hazard avoidance, and requires that new development be sited and designed to ensure long-term structural integrity, minimize future risk, and to avoid landform-altering protective measures, such as armoring along the shoreline, as part of proposed development projects or in the future. Applicable policies include:

**LUP Policy 3.7.2.3:** *All development shall be sited and designed to minimize risk from geologic, flood, or fire hazards to a level generally acceptable to the community. Areas of a parcel which are subject to high hazard(s) shall generally be considered unsuitable for development. For any development proposed in high hazard areas, an environmental or geotechnical report shall be required prior to County review of the project.*

**LUP Policy 3.7.3.A.1:** *All development shall be sited and designed to conform to site topography and to minimize grading and other site preparation activities. Applications for grading and building permits and applications for subdivisions shall be reviewed for potential impacts to on-site and off-site development arising from geologic and seismic hazards and erosion. Mitigation measures shall be required as necessary.*

**LUP Policy 3.7.3.A.9:** *Any proposed development within 50 feet of the face of a cliff or bluff or within the area of a 20 degree angle from the toe of a cliff, whichever is greater, shall require the preparation of a geologic report prior to consideration of the proposed project. The report shall demonstrate that (a) the area is stable for development; and (b) the development will not create a geologic hazard or diminish the stability of the area.*

**LUP Policy 3.9.1.1:** *Blufftop setbacks shall be adequate to avoid the need for seawalls during the development's economic lifespan.*

**CIP Section 20.145.080.A.1.b.2:** *Geologic Hazards, Geologic Report Requirement:*  
*...Regardless of a parcel's seismic hazard zone, a geologic report shall also be required for any development project located in the following areas: within 50 feet of the face of a cliff or bluff...*

**CIP Section 20.145.080.A.2.g:** *All development shall be sited and designed to conform to site topography, to minimize grading and disturbances resulting from site preparation, and to minimize the hazards of geologic instability. Projects requiring excessive or non-essential site grading shall not be approved. Likewise projects which would create a geologic hazard or diminish the stability of the areas shall not be approved. Areas which are determined by the geologic report or otherwise as being unstable, or subject to geologic hazards which cannot be reasonably mitigated, shall generally be considered as unsuitable for development.... (Ref. Policies 3.7.2.3, 3.7.3.A(1), and 3.7.3.A(9))*

**CIP Section 20.145.080.A.2.h:** *New development on bluffs subject to erosion shall be set back sufficiently to avoid the need for seawalls during the development's economic lifespan. Such blufftop setbacks shall be based on the predicted erosion rates identified in the required geologic report. (Ref. Policy 3.9.1.1)*

**CIP Section 20.145.080.C Fire Hazards: Development Standards:**

*a. Proposed projects which are located within areas of high or very high fire hazard, as indicated on current California Department of Forestry Fire Hazard maps, shall incorporate recommendations of the County Fire Warden and/or local fire district into project design, as follows:*

*1) If the proposed project requires a Coastal Development Permit or other discretionary permit, the project shall be referred to the County Fire Warden or local district prior to submittal of the application to the Planning Department as per the procedures contained in Section 20.140.080.D.1. The recommendations shall then be made conditions of project approval, including that:*

*a) a deed restriction be recorded which states that the fire hazards exist on the parcel and that development may be subject to certain restrictions, required as per Section 20.142.130;*

- b) a note be placed on the parcel, or final map, in the case of a subdivision, which indicates the development restrictions as recommended by the County Fire Warden;*
- c) any road proposed to serve access to residential development be of specified width, surface, and grade, or other measures as necessary for adequate fire protection service; and*
- d) fire-resistant materials be used in the construction of exterior walls and fire retardant materials, such as tile, asphalt, treated fire-retardant shingles, be used in the construction of roofs.*

## **Analysis**

### *Blufftop Setbacks*

The Big Sur LCP requires all development to be sited to minimize risks from geologic, flood, and fire hazards and requires areas of a parcel that are subject to high hazards to generally be considered unsuitable for development (see LUP Policy 3.7.2.3 and CIP Section 20.145.080.A.2.g). For proposed development within 50 feet of a blufftop edge, the LCP requires preparation of a geologic report that must demonstrate that the area is stable for development and that the development will not create a geologic hazard or diminish the stability of the area (see LUP Policy 3.7.3.A.9 and CIP Section 20.145.080.A.1.b.2). The LCP also requires adequate setbacks from the bluff edge to avoid the need for seawalls during the economic life of the development (see LUP Policy 3.9.1.1 and CIP Section 20.145.080.A.2.h). The LCP does not define the length of time one should consider the “economic life” of a development, and it does not identify a specific minimum blufftop setback distance for new development. In the Sea Level Rise Guidance that the Commission adopted in 2015, the Commission found 75-100 years to be an appropriate time frame in which to analyze the economic life of a single family residence.<sup>23</sup> In past permit actions, when implementing Coastal Act Section 30253 the Commission has similarly used this range as an appropriate estimate for the economic life of a residence. (See, e.g. Maier 1-10-010 “The Commission has generally assumed the economic life of a new house to be 75 to 100 years.”). The Commission certified the Solana Beach LUP with an assumption of a 75-year economic life, and the City of Malibu LCP assumes a 100-year economic life. Thus, although the LCP does not define this term, it is appropriate to analyze the proposed development as if it had an approximately 75-100 year economic life.

The project site is located along a fairly rocky shoreline in an area known as Kasler Point, which is itself a rocky promontory that extends approximately 60 feet above sea level (see photos of the site and surrounding area in **Exhibits 3 and 4**). Geologically, the site is comprised of a thin mantle (i.e., less than five feet thick) of marine terrace deposits overlaying Mesozoic age granite rock. The site slopes gently seaward from the highway to a rocky vegetated knoll. As described earlier, a relatively flat building pad was created at the seaward base of this knoll in the late 1970s (see “Project Location and Site Description” section above and “Violation” section below), and the proposed residence would be located in this approximately 8,300-square-foot

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<sup>23</sup> California Coastal Commission (2015). California Coastal Commission Sea Level Rise Policy Guidance: Interpretive Guidelines for Addressing Sea Level Rise in Local Coastal Programs and Coastal Development Permits. Adopted August 12, 2015. Pg. 101.

relatively level area located between the base of the knoll and the blufftop edge. Some of the soils that were excavated in the 1970s to create the building pad remain on the sloped bluff face and on the ‘saddle’ between Kasler Point and the knoll, and much of this material is now largely vegetated. Because the residence is proposed on an area of the site that is adjacent to the blufftop edge, the primary coastal hazard issues are ensuring that the development has been sited and designed to conform to site topography and to minimize grading, that the building locations are suitable and stable for development, and that the development is adequately set back from the blufftop edge to avoid the need for armoring during the project’s lifetime.

The Applicant has submitted the geologic investigation prepared for the previously-proposed project, and has also submitted an updated geologic report.<sup>24</sup> The original report estimated coastal bluff erosion to be approximately 0.36 feet on average per year (based on air photo analysis between 1942 and 2001). In addition, the original report also indicated that the site was very stable based on slope stability investigations.<sup>25</sup> The 2016 report also reviewed historic aerial photos (between 1967 to 2014), as well as fairly recent published research on erosion rates for the Big Sur coast (from 2004 and 2007) to estimate an average erosion rate of 0.1 feet per year at the project site, noting that this amount was reasonable given the limited amount of retreat at the site from 1967 to 2014. Based on this analysis, the 2016 report recommends that at a minimum a 20-foot setback from the blufftop edge be provided to ensure safety and stability.

The 2016 report also discusses sea level rise and its effect on erosion rates, and utilizes Monterey County-specific estimations from the 2009 Pacific Institute report.<sup>26</sup> That report indicates that by 2100, the bluffs in Monterey County could experience an average erosion distance of 37 cm (1.2 feet) and a maximum erosion distance of 220 cm (7.2 feet). The project report concludes that those study results are not intended to provide site-specific details, but that the recommended 20-foot setback should allow for any increase in erosion rates due to sea level rise over the next 100 years.

Consistent with the Applicant’s 2016 geologic report recommendation, all development on the blufftop (including the residence, driveway, and vehicle turnaround) is proposed to be situated a minimum of 20 feet from the blufftop edge in the previously disturbed and graded building pad

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<sup>24</sup> Proposed Laube-Engel Residence, Kasler Point, Big Sur, Project Review, Prepared by Haro, Kasunich and Associates, Inc. (January 13, 2004); Response to California Coastal Commission Request for Additional Information Regarding Coastal Bluff Setback Conditions and Long Term Stability, Proposed Laube/Engel Residence, Kasler Point, Haro, Kasunich and Associates, Inc. (November 8, 2004); and Geological Report, Kasler Point, 36228 Highway One, Big Sur, CA prepared by Caprock Geology, Inc. (September 23, 2016).

<sup>25</sup> Trenches were excavated on both the north and south sides of Kasler Point to determine the subsurface profile of the coastal bluff relative to the previous grading, and to determine the strength characteristics of the granitic fill, terrace deposits, and granitic regolith. Based on the subsurface trench profiles and shear strength lab results, the report concluded that the site has high internal shear strength values and cohesion, which even if reduced by a third or a half to be conservative, would mean the slope could still hold a gradient of 1.5:1 (horizontal to vertical, or around 33 degrees) with a factor of safety of 3.8 to 11 over time.

<sup>26</sup> Heberger, et al., The Impacts of Sea Level Rise on the California Coast, Final Paper, May 2009 (CEC-500-2009-024-F)

area.<sup>27</sup> The proposed residence has been designed such that very little excavation of the adjacent knoll would be required for the project (245 cubic yards) unlike the previous approval here (1,750 cubic yards of cut and 736 cubic yards of fill), resulting in a house that would essentially be fitted into the areas between the blufftop setback and the knoll. Furthermore, the proposed driveway would be in the same location of the existing driveway (see “Violation” section below). Thus, the proposed project minimizes grading and landform alteration, as required by LUP Policy 3.7.3.A.1 and CIP Section 20.145.080.A.2.g.

With respect to the necessary blufftop setback distance, the two reports provided arrive at differing estimated annual erosion rates (i.e., 0.36 feet per year from the 2004 report and 0.1 feet per year from the 2016 report), primarily due to differing methodologies. No apparent measurable changes have occurred to the development site or blufftop since the original 2004 evaluation, and thus this evidence over the last 12 years does not provide a basis to lend more credence to one or the other of the estimates. Applying the slope stability determinations from the original report,<sup>28</sup> and the two identified annual erosion rates (i.e., 0.36 feet per year from the 2004 report and 0.1 feet per year from the 2016 report), a range of potential erosion and setback scenarios can be developed. For the 0.1 feet per year rate (and accounting for slope stability), the 20-foot proposed setback would provide a stable building site for about 70 years on the southern end of the bluff to about 130 years on the northern end of the bluff. For the 0.36 feet per year estimate, the range is from about 19 to 36 years. Thus, potential stability over time varies considerably at this site based on evidence presented.

In terms of the need for potential armoring, the data gives some pause that at the more conservative erosion rates, the residence could become endangered in as soon as 20 years. If the less conservative erosion rate proves to be more accurate over time, then the proposed residence may not need armoring for close to 70 years. Given these uncertainties, and the difficulty in assessing the impacts of sea level rise, development that could be endangered in as little as 20 years cannot be found consistent with the LCP requirement that development be sited so that it would avoid the need for shoreline protection during the development’s economic lifespan. As discussed below, however, the project may nevertheless be approved to avoid an unconstitutional taking of private property.

### *Fire Hazards*

The LCP also requires proposed development to minimize risk from fire hazards, and requires adherence to current California Department of Forestry and Fire Protection (CalFire) and local fire agency recommendations for development in high fire hazard areas. Like much of Big Sur, the project site is located in a very high fire hazard area. CalFire provided requirements for the project for fire fighting purposes that include technical driveway specifics, house construction

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<sup>27</sup> The operable wall-sized window coverings on the west side of the house that would open and act as decking when the residence is in use would cantilever into the 20-foot setback area by 10 feet. These elements of the project are removable if any issues arise with their use as decking into the 20-foot setback area (Special Condition 8.c.(iv)).

<sup>28</sup> The 2004 report concluded that any setback needs to include 7 feet (on the northern side of the headland) and 13 feet on the southern side of the headland to account for the possibility of the slope laying back to 1.5:1. And again, even if shear strength values and cohesion were reduced by a third or a half to err on the conservative end, such setback allows for a factor of safety of 3.8 to 11 over time, which is significantly higher than the industry standard of 1.5.

adherence to California WUI Standards, and trimming of the cypress trees from below to provide fire truck clearance. No defensible space clearance is expected to be required by CalFire given that the vegetation on the site in the scrub habitats is short in stature, and much of the area surrounding the proposed house is comprised of rock and rocky soils. As such, with incorporation of the CalFire requirements, the proposed project will minimize risks from fire hazards as required by the LCP.

#### *Hazards Conclusion*

In summary, although the project as proposed raises issues with coastal hazards, there are a series of conditions that could be applied to address such issues and allow a finding of LCP consistency. (See “Takings” section below for further discussion).

## **H. WATER RESOURCES**

The Monterey County LCP places great importance on the maintenance of the health of streams and groundwater for the species and natural systems that rely on them. For all development applications that require domestic water use, the LCP requires proof of adequate water quantity and quality. Applicable policies include:

**LUP Key Policy 3.4.1:** *The protection and maintenance of Big Sur's water resources is a basic prerequisite to the protection of all other natural systems. Therefore, water resources will be considered carefully in all planning decisions and approvals. In particular, the County shall insure that adequate water is retained in the stream system to provide for the maintenance of the natural community of fish, wildlife, and vegetation during the driest expected year.*

**LUP Policy 3.4.2.2:** *The County will require adherence to the best watershed planning principles including: stream setbacks, stream flow maintenance, performance controls for development site features, maintenance of safe and good water quality, protection of natural vegetation along streams, and careful control of grading to avoid erosion and sedimentation.*

**LUP Policy 3.4.2.3:** *Where watersheds are affected or are threatened by overuse of the water supply, the County will use its land use regulatory authority to limit development in order to protect the public health and welfare and to protect the natural values of the stream and its watershed.*

**LUP Policy 3.4.2.5:** *The County shall in concert with the State Department of Water Resources and the Division of Water Rights, and the Department of Fish and Game, be responsible for cooperating with residents to manage surface and groundwater supplies, and to implement the goals and policies of this section. In approving new development, the County will require the monitoring of water use and the observance of water conservation measures.*

**LUP Policy 3.4.3.A.1:** *Applicants for development of residential, commercial, and visitor-serving facilities must demonstrate by appropriate seasonal testing that there will be an adequate water supply for all beneficial uses and be of good quality and quantity (e.g. at least 1/2 gallon per minute per single family dwelling year round) from a surface or groundwater source, or from a community water system under permit from the County.*

**LUP Policy 3.4.3.A.4:** *Interbasin transfer of water: No new water system and no expansion of existing water systems which transport water out of the watershed of any perennial stream shall be allowed. Undeveloped parcels outside of the watershed of origin shall not be allowed to utilize transported water. Permit applications shall demonstrate a suitable source of water not requiring establishment or expansion of, or intensification of use, of an interbasin water transfer system. Where no on-site surface water source exists, exceptions may be made on a case-by-case basis for the development of a primary residence on a vacant parcel served by a County-approved connection to an existing water system. Where the total number of existing/potential vacant buildable residential parcels on such water system is more than four, such exceptions will be subject to a demonstration that:*

- a. no significant degradation of any of the Big Sur Coast's trout streams or other environmentally sensitive habitats will result, as demonstrated by an appropriate environmental assessment prepared in accordance with California Department of Fish and Game standards.*
- b. no increased water system pumping, transmission or storage capacity (other than fire reservoir capacity) will be required for the proposed development; and*
- c. such exception will not result in export of water beyond the Big Sur Coast or the authorized service area of the Carmel Riviera Mutual Water Company.*

**LUP Policy 3.4.3.B.1:** *The effects of all new development proposals or intensification of land use activities or water uses on the natural character and values of the Big Sur coast's rivers and streams will be specifically considered in all land use decisions. Subjects to be addressed in such evaluations include protection of scenic quality, water quantity and quality, wildlife and fish habitat, and recreational values. Land use proposals determined to pose significant impacts to the natural integrity of the stream must be modified accordingly. The County will request assistance from the Department of Fish and Game as a technical expert on wild life and fish habitat and mitigation measures.*

**LUP Policy 3.4.3.B.3:** *Water quality, adequate year-round flows, and stream bed gravel conditions shall be protected in streams supporting rainbow and steelhead trout. These streams include: Garrapata Creek, Rocky Creek, Bixby Creek, Little Sur River, Big Sur River, Partington Creek, Anderson Creek, Hot Springs Creek, Vicente Creek, Big Creek, and Limekiln Creek.*

**CIP Section 20.145.050:** *Intent of Section. The intent of this Section is to provide development standards which will allow for the protection and maintenance of Big Sur's water resources, as a basic prerequisite to the protection of all other natural systems. Therefore, water resources will be considered carefully in all planning decisions and approvals. In particular, the County shall ensure that adequate water is retained in the stream system to provide for the maintenance of the natural community of fish, wildlife, and vegetation during the driest expected year. (Ref. Policy 3.4.1)*

**CIP Section 20.145.050.A.1:** *Development of residential, commercial, and visitor-serving facilities shall be required to demonstrate that there is an adequate water supply of good quality and quantity from a surface or groundwater source, or from a community water system under permit from the County. A single-family dwelling must have at least a 1/2 gallon per minute. An adequate water supply for commercial and visitor serving facility shall be based on estimated water usage and then equated to an equivalent numerical user public water system. Water flow rate measurements of springs or surface sources shall be done in the driest portion of the year. The determination of adequacy shall be made by the County Health Department.*

*The procedure shall be as follows. The proposed development shall be reviewed by the Health Department as per the procedures contained in Section 20.140.080.D. At that time, the Health Department shall determine what additional information, such as specific testing (such as testing during the driest expected month) or hydrologic reports, may be needed in order for the department to evaluate water supply adequacy. All such information must be submitted to the satisfaction of the Health Department prior to the application being determined complete. Once submitted, the Health Department shall make a determination as to the water supply's adequacy and provide written verification to the Planning Department as to the results of the determination. (Ref. Policy 3.4.3.A.1)*

**CIP Section 20.145.050.A.5:** *An undeveloped parcel in one watershed shall not be allowed to utilize water which has been transported from another watershed. However, an exception may be made for the development of a primary residence on a vacant parcel if:*

*a. no on-site surface water supply exists; and,*

*b. the parcel is to be served by a County-approved connection to an existing water system. Where the total number of existing/potential vacant buildable residential parcels on such water system is more than four, such exceptions will be subject to a demonstration that:*

*1) No significant degradation of any of the Big Sur Coast's trout streams or other environmentally sensitive habitats will result. As such, pursuant to the procedures in Section 20.140.080. D, the planner shall evaluate the proposed project's potential to degradate the originating watershed's environmentally sensitive habitats and trout streams. Planner shall consult with the California Department of Fish and Game where needed to evaluate impacts. Upon the California Department of Fish and Game's recommendation or upon planner's identification of potential impacts, a biological survey shall be required in accordance with Section 20.145.040.A. Prior to the survey being accepted by the Director of Planning, it shall be transmitted to the California Department of Fish and Game for review and comment.*

*2) No increased water system pumping (i.e. pumping of water at the water source) transmission or storage capacity (other than fire reservoir capacity) will be required for the proposed development as verified by both the Health Department and County Fire Warden's Office or local fire district. The verification must be provided in*

*writing to the Planning Department prior to the application being determined complete.*

*3) Such exception will not result in export of water beyond the Big Sur Coast or the authorized service area of the Carmel Riviera Mutual Water Company.*

*Water system development or expansions constructed or installed after December 31, 1976, without benefit of coastal development permit will not be considered as existing. (Ref. Policy 3.4.3.A.4)*

**CIP Section 20.145.050.B.1:** *Development which is either new or includes intensification of land use or water use shall not be permitted if it will result in significant adverse impacts to a river or stream's scenic quality, water quality or quantity, wildlife or fish habitat, or recreational values. "Intensification" shall include such development as subdivisions, second units, commercial uses, and expansion of an existing or development of a new water system. During project review, pursuant to Section 20.140.080, the planner shall evaluate the development for such potential impacts to adjacent or nearby, rivers and streams.*

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*Evaluation of impacts to water quality and quantity of nearby or adjacent streams shall be made through the planner's project review. The planner shall consult with the Health Department in order to make the evaluation. If the departments determine that there are potentially significant impacts, then a hydrologic report shall be required. The report shall be prepared by a qualified professional hydrologist or registered civil engineer, at the applicant's expense. The report shall be required by, submitted to, and accepted by the Planning Department prior to the application being determined complete. The report shall, at a minimum, evaluate the existing water quality and quantity of the potentially-impacted river or stream, including seasonal fluctuations, the proposed development's intended water use, and the resulting potential changes in the river or stream's water quantity and quality. The report shall include an evaluation of ground and surface water conditions and variations, including hydrologic changes caused by the development (e. g. introduction of sewage effluent and irrigation water to the groundwater system and alteration in surface drainage). As well, the report shall provide recommendations and mitigation measures to reduce potential impacts. Such recommendations shall be made conditions of project approval where needed to mitigate impacts. Prior to the report being accepted by the Planning Department, the Planning Department shall transmit a copy to the Health Department for review and comment.*

*Evaluation of impacts to fish and wildlife of nearby or adjacent rivers or streams shall be made through the planner's initial review of the project. The planner shall consult with the California Department of Fish and Game where necessary to determine potential impacts. Upon the planner's identification of potential impacts, or upon recommendation of the Department of Fish and Game, a biological survey shall be required in accordance with the requirements of Section 20.145.040.A prior to the application being determined complete. If a hydrologic report has been prepared, it shall be included in the biological survey assessment. Prior to the survey being accepted by the Planning Department, the Planning Department shall transmit a copy to the California Department of Fish and Game for review*

*and comment. Recommendations contained in the survey shall be made conditions of project approval where needed to mitigate adverse impacts to fish and wildlife habitats. (Ref. Policy 3.4.3.B.1).*

**CIP Section 20.145.050.B.3:** *Development shall not cause significant adverse impacts to water quality, year-round flows, and/or stream bed gravel conditions of Garrapata Creek, Rocky Creek, Bixby Creek, Little Sur River, Big Sur River, Partington Creek, Anderson Creek, Hot Springs Creek, Vicente Creek, Big Creek, or Limekiln Creek, where such changes may cause significant adverse impact on the rainbow and/or steelhead trout populations.*

*During project review, pursuant to Section 20.140.080.D, the planner shall evaluate the proposed Development's potential adverse impacts on rainbow and/or steelhead trout population as potentially caused by changes in water quality, year-round flows and/or stream bed gravel conditions of Garrapata Creek, Rocky Creek, Bixby Creek, Little Sur River, Big Sur River, Partington Creek, Anderson Creek, Hot Springs Creek, Vicente Creek, Big Creek, and Limekiln Creek. The planner shall consult with the California Department of Fish and Game where necessary to determine potential adversely impacts. Upon the planner's identification of potential impacts to rainbow and/or steelhead trout populations, or upon the California Department of Fish and Game's recommendation, a hydrologic report and biologist's assessment shall be required. Each shall be required by, submitted to and accepted by the Planning Department prior to the application being determined complete. Four copies of each report shall be submitted. Prior to Planning Department acceptance, the Planning Department shall transmit the reports to the California Department of Fish and Game for review and comment. (Ref. Policy 3.4.3.B.3).....*

**CIP Section 20.145.050.C.1:** *All new construction, as a condition of project approval, shall be required to be equipped with ultralow flush toilets with a maximum tank size or flush capacity of 1-1/2 gallons, and with shower heads with a maximum flow capacity of 2-1/2 gallons per minute. Provisions for these measures shall be included on building plans submitted to the Department of Building Inspection, prior to issuance of building permits. (Ref. Policy 3.4.2.5)*

## **Analysis**

### *Water Supply for Rocky Point Area Residences*

The Rocky Point area residential parcels (which include the project site) and the Rocky Point Restaurant obtain water from the former Garrapata Water Company (GWC), which is now owned and operated by California American Water (Cal-Am) as of 2013. This community water system draws water from a well located approximately 1,500 feet upstream from the mouth of Garrapata Creek and has been in operation since 1962. The system's service area is outside and to the south of the Garrapata Creek watershed.

In 1990, GWC applied to the State Water Resources Control Board (SWRCB) to appropriate water from the Garrapata Creek subterranean stream. The application requested a water right permit for year-round direct diversion of 72,000 gallons per day, not to exceed 81 acre-feet per

annum (afa) to cover municipal and domestic use.<sup>29</sup> Three parties filed protests to the application, one of which (the California Department of Fish and Game, now Fish and Wildlife (DFW)) alleged that cumulative impacts of water diversions within the Garrapata Creek watershed were causing low flows in the creek, adversely affecting steelhead trout (*Oncorhynchus mykiss*) and other resources associated with the creek. After a lawsuit and multiple hearings on the matter, the SWRCB ultimately confirmed in 1999 that the GWC well was drawing from a subterranean stream associated with Garrapata Creek, and was therefore subject to CEQA, but that if GWC were to modify its requested water amount, GWC could be exempt from CEQA.<sup>30</sup> Accordingly, GWC amended its SWRCB application to request no more than 35 afa, which the SWRCB found to be a reasonable estimate of current annual water use by GWC. In order to further ensure that this diversion did not have an adverse effect on steelhead, riparian habitat, and other public trust resources within the lower portion of Garrapata Creek, the SWRCB decision on the application also required GWC to cease diversions if visible flow was not present downstream of its point of diversion (but was present 100 yards upstream of the point of diversion).<sup>31</sup> The SWRCB therefore issued Permit 21010 to GWC. Also, notably, in a separate but related action, in October 1997, the National Marine Fisheries Service added steelhead to the list of threatened species under the Federal Endangered Species Act in the area that encompasses the Garrapata Creek watershed.

Between 1999 and 2008, GWC failed to monitor and record water meter readings as required by SWRCB Permit 21010 and consistently exceeded the 35 afa limitation. The SWRCB issued a cease and desist order against GWC, which was settled in 2010 subject to GWC agreeing to provide monthly records of diversion amounts, observations of channel flow in the creek, and conservation measures provided to property owners.<sup>32</sup> GWC satisfied these requirements until 2013 when Cal-Am acquired GWC (and became subject to the 35 afa diversion limitation), and Cal-Am continues to provide monthly accounts of water use and stream flow to the SWRCB. In other words, for purposes of its authorization to divert water from the Garrapata Creek subterranean stream, Cal-Am has “stepped into the shoes of” GWC. According to SWRCB staff, the GWC/Cal-Am annual water withdrawals from the creek have ranged from 26.26 afa to 34.73 afa and visible up- and downstream flow has been maintained in the creek since 2011.<sup>33</sup> In 2006, two studies assessed the overall condition and health of the Garrapata Creek watershed, particularly as related to steelhead trout.<sup>34,35</sup> These studies found that juvenile steelhead were not

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<sup>29</sup> State of California State Water Resources Control Board, Division of Water Rights, Application 29664.

<sup>30</sup> State of California State Water Resources Control Board Decision 1639, In the Matter of Application 29664 of Garrapata Water Company, June 17, 1999.

<sup>31</sup> State of California State Water Resources Control Board, Division of Water Rights, Division Decision 99-01, September 24, 1999 and Permit 21010.

<sup>32</sup> State of California State Water Resources Control Board, Division of Water Rights, Order WR 2010 – 0028 – EXEC, In the Matter of Diversion and Use of Water by Garrapata Water Company, Order Approving Settlement Agreement and Cease and Desist Order, September 9, 2010.

<sup>33</sup> Personal communication between Matt Quint, SWRCB staff and Katie Butler, Coastal Commission staff, March 22, 2017.

<sup>34</sup> The Garrapata Creek Watershed Council, Garrapata Creek Watershed Assessment and Restoration Plan, July 2006.

using Garrapata Creek Lagoon for rearing as they historically have in most, if any, years but that lack of water from domestic use diversions was not cited as a likely cause.

In 2009, GWC undertook an improvement project in response to a boil order from the Monterey County Department of Environmental Health (DEH) that involved replacement of existing water tanks, distribution pipelines, and a new filtration system.<sup>36</sup> The improvements were required to meet filtration and time requirements for chlorinated water contact, and to ensure delivery of safe drinking water per State health and safety standards to the properties in the service area. According to Monterey County DEH staff, the system has been in compliance with State and County water quality requirements since the improvements were completed.<sup>37</sup>

### *LCP requirements*

The LCP requires careful consideration of water resources in all planning decisions and approvals, in particular to ensure that adequate water is retained in stream systems for the maintenance of natural communities of fish, wildlife, and vegetation, and so that the natural character, scenic quality, and recreational value of streams are protected (LUP Key Water Resources Policy 3.4.1, LUP Policies 3.4.2.2 and 3.4.3.B.1, and CIP Sections 20.145.050 and 20.145.050.B.1). The LCP provides the County with the ability to limit development in order to protect watersheds that are threatened by overuse; to require monitoring of water use and water conservation measures; and to require demonstration of adequate water supply for all beneficial uses and good quality and quantity (LUP Policies 3.4.2.3, 3.4.2.5, and 3.4.3.A.1 and CIP Section 20.145.050.A.1). In order for vacant residential parcels to utilize water (individually or as part of a community system) obtained from a perennial stream source outside its watershed, the Applicant must demonstrate: (1) no significant degradation of a trout stream or other ESHA; (2) no increased water system pumping, transmission, or storage capacity will be required for the proposed development, and (3) no resulting export of water beyond the Big Sur coast (LUP Policy 3.4.3.A.4 and CIP Section 20.145.050.A.5). Furthermore, the LCP specifically identifies Garrapata Creek as a stream supporting rainbow and steelhead trout wherein water quality, adequate year-round flows, and stream bed gravel conditions must be protected (LUP Policy 3.4.3.B.3 and CIP Section 20.145.050.B.3). Finally, the LCP requires that new development include water-conserving features, such as ultra-low flush toilets and low-flow showerheads (CIP Section 20.145.050.C.1).

### *Project Consistency*

The project site is within the Cal-Am service area and has an existing connection to the Garrapata Creek community water system. Cal-Am staff indicated that they have no record of when the water meter was installed or when the previous owners began service to the site, but

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<sup>35</sup> Casagrande, Joel and Smith, Doug, *Garrapata Creek Lagoon, Central Coast, California: A Preliminary Assessment*, Report No. WI-2006-01, The Watershed Institute, Department of Science and Environmental Policy, California State University Monterey Bay, January 2006.

<sup>36</sup> Monterey County Resource Management Agency, Planning Department, Coastal Development Permit (CDP) Application PLN110027, approved on November 14, 2012 (in follow up to Emergency CDP PLN090207, approved June 12, 2009).

<sup>37</sup> Personal communication between Cheryl Sandoval, Monterey County Department of Environmental Health and Katie Butler, Coastal Commission staff, March 23, 2017.

state that the account is currently active in the Applicant's name.<sup>38, 39</sup> As described above, SWRCB staff indicated that Cal-Am has stayed within its 35 afa diversion limit for the Garrapata Creek service area since the 2010 settlement agreement. This is consistent with the *2015 Cal-Am Urban Water Management Plan* (required by the State of California Department of Water Resources for current and long-range water supply planning purposes), which indicates that water withdrawals from Garrapata Creek between 2011 and 2015 ranged from 26 to 35 afa.

The proposed project would add one new home to the Garrapata Creek water system. The SWRCB's 'Guide to Water Right Appropriations' provides a general estimate that water use for a single home is 55-75 gallons per day (gpd) per person. According to the monthly reports on the system provided to the SWRCB, in 2016 overall weekly diversions ranged from approximately 70,000 gallons per week (10,000 gpd) to 265,000 gallons per week (37,857 gpd) for a total of 23.8 afa. Occupation of the proposed home, with two bedrooms, two bathrooms, one kitchen, and a relatively modest overall square footage (2,315 square feet of living space) would not be expected to result in significant water usage on a regular basis. Furthermore, although this is not guaranteed to be the case in perpetuity, the Applicant has indicated that the proposed residence would not be used as a primary residence but instead would be used as a vacation home, which should result in less water use than if it were being used as a primary residence.

The Garrapata Creek Community Water system appears able to support the proposed new residence without exceeding the required 35 afa limitation. Staff at the SWRCB indicated that they cannot say definitely whether or not one new residence within the service area would result in exceedance of the 35 afa diversion limitation but note that it is Cal-Am's responsibility to continually and on an ongoing basis monitor and report to the SWRCB regarding water usage from Garrapata Creek.<sup>40</sup> In addition, Monterey County DEH stated that the system has the capacity for a new residence and DEH has no reason to believe that, given the recent upgrades for quality purposes, one new residence would be unsupportable.<sup>41</sup> As such, it appears there is adequate water of good quality available to serve the proposed project, as required by the LCP. Furthermore, results from monitoring of the creek from 2011 to 2016 indicate no reduction in Garrapata Creek flows as a result of this water system's withdrawals, and this creek's flows will continue to be monitored by the SWRCB on an ongoing basis. As such, it is not likely that the proposed project would result in significant degradation of Garrapata Creek including in relation to flows, streambed gravel conditions, or water quality for steelhead trout. For all the reasons stated above, the proposed project is consistent with the LCP provisions cited above with respect to maintenance of the health of streams and proof of adequate water quantity and quality.

However, the Applicant has not provided any evidence that water-saving devices will be

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<sup>38</sup> Personal communication between Eric Sabolsice (Cal-Am staff) and Rosie Brady (Coastal Commission staff), June 30, 2016.

<sup>39</sup> Existing violations at the site, including in relation to water use, are discussed below in Section M below.

<sup>40</sup> Personal communication between Matt Quint (SWRCB staff) and Katie Butler (Coastal Commission staff), March 22, 2017.

<sup>41</sup> Personal communication between Cheryl Sandoval (DEH staff) and Katie Butler (Coastal Commission staff), March 23, 2017.

employed in the residence, as required by CIP Section 20.145.050.C.1. As such, the potential exists for impacts to the system and to Garrapata Creek resources which can be reduced through reasonable and feasible mitigation measures. (See “Takings” section below for further discussion.)

## I. ARCHAEOLOGICAL RESOURCES

The Monterey County LCP includes the following relevant policies related to protection of archaeological resources:

***LUP Key Policy 3.11.1:** Big Sur's archaeological resources, including those areas considered to be archaeologically sensitive but not yet surveyed and mapped, shall be maintained and protected for their scientific and cultural heritage values. New land uses and development, both public and private, should be considered compatible with this objective only where they incorporate all site planning and design features necessary to avoid or mitigate impacts to archaeological resources.*

***LUP Policy 3.11.2.1:** All available measures, including purchase of archaeological easements, dedication to the County, tax relief, purchase of development rights, etc., shall be explored to avoid development on significant historic, paleontological, archaeological, and other classes of cultural sites.*

***LUP Policy 3.11.2.2:** When developments are proposed for parcels where paleontological resources or archaeological or other cultural sites are located, project design shall be required which avoids or substantially minimizes impacts to such cultural sites. To this end, emphasis should be placed on preserving the entire site rather than on excavation of the resource, particularly where the site has potential religious significance.*

### Analysis

The project site contains a potentially significant cultural resource site on the northern parcel, which was identified in 1977 during consideration of the earlier Sorenson application (CDP A-174-77). The Commission’s 1977 CDP approval acknowledged the presence of this cultural resource and found that construction of the residence and driveway at that time would not disturb it. The condition imposed by the Commission for the scenic and conservation easement also required protection of the archaeological site. The recorded easement (see **Exhibit 7**) includes this cultural resource within the protected area of the site.

The proposed project would utilize the existing driveway and building pad area, which are no closer than approximately 15 feet from the location of the potentially significant cultural resource on the site. No encroachment into or disturbance of the existing easement area would occur under the proposed project. However, additional archaeology resources could be located on the site outside of the easement area and in the vicinity of the proposed construction areas, and the Applicant has not proposed any monitoring during construction to protect such resources. As such, the potential exists for impacts potential archaeological resources on the site, which can be reduced through reasonable and feasible mitigation measures. (See “Takings” section below for further discussion.)

## **J. PERMIT DETERMINATION CONCLUSION**

As discussed in the sections above, the proposed project is in part consistent and in part inconsistent with the LCP. Most critically, the residence is proposed to be built in ESHA, which is not allowed under the LCP's ESHA protection requirements. Almost the entire four-acre site is ESHA, and the remainder of the parcels (outside the proposed development area) is burdened by an existing scenic and conservation easement that precludes development. Even if no easement existed on the remainder of the property, it is likely that sensitive habitat and species (in particular, seacliff buckwheat) is present in these areas, raising the same problems of inconsistency with the LCP's ESHA requirements as the proposed project. Thus *any* residence proposed in a de novo review would also be inconsistent with the LCP.

In addition, the proposed project is inconsistent with the visual resource and coastal hazards policies of the LCP. With respect to visual resources, the proposed residence has been sited and designed such that the rocky knoll and existing trees would effectively screen it from public view. However, over time, the trees could be damaged, grow, or die such that development becomes visible, exposing previously unseen development inconsistent with LCP requirements to modify and minimize development to reduce its visibility. And the proposed gate and driveway have not been designed for minimum visibility, and in particular for the driveway, to be as narrow as possible.

With respect to coastal hazards, the proposed project has been sited and designed with a 20-foot blufftop setback. Erosion rates provided for the site indicate that potential stability over time varies considerably (and a more conservative projection of the economic life of the development premised on the more conservative erosion rates would suggest a 20-foot blufftop setback is not consistent with the LCP). However, considering the unique facts and circumstances of this specific situation (development potential limited by existing easement and ESHA onsite; development proposal limited to existing graded area; assumption of hazards risks by applicant), the Commission approves the proposed project with the proposed setback on the narrow basis of avoiding an unconstitutional taking of private property. Furthermore, the project could only be found consistent with the LCP's no future seawall policy with the inclusion of a series of requirements to remove and/or relocate potentially threatened development subject to defined triggers, as is required as conditioned here.

The proposed project is not expected to impact Garrapata Creek resources or archaeological resources on the site inconsistent with the LCP, but the potential exists for impacts, which can be reduced through reasonable and feasible mitigation measures (requirements for low-flow water fixtures and archaeological monitoring, respectively).

### *Conclusion*

Although some of the above inconsistencies could be remedied by special conditions if the project were otherwise able to be sited in such a way as to be consistent with the LCP, a fundamental issue exists that requires denial of the project. Namely, the project is sited in ESHA, which is prohibited by the LCP, and no number or type of conditions can correct this fundamental and critical inconsistency. Thus, the LCP directs that the project should be denied.

## K. TAKINGS

### **Avoiding a Potential Unconstitutional Taking of Private Property**

As discussed above, the proposed project is inconsistent with the LCP in a way that cannot be rectified by conditions of approval. Therefore, as a matter of LCP consistency, the project should be denied. However, when the Commission considers denial of a project, a question may arise as to whether the denial results in an unconstitutional “taking” of the Applicant’s property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

*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.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with some confidence 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 justifies approval of a project on the narrowest grounds to avoid an unconstitutional taking of property without just compensation. In this latter situation, the Commission will oftentimes propose modifications to the development to minimize its Coastal Act and LCP inconsistencies while still allowing some reasonable amount of development.<sup>42</sup>

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the proposed development could constitute a taking. As discussed further below, the Commission finds that to avoid a taking in compliance with Section 30010 and constitutional law, the Commission will allow a reasonable residential development on the subject property that is designed to avoid coastal resource impacts and LCP inconsistencies as much as possible.

### **General Takings Principles**

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>43</sup> Article 1, section 19 of the California

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<sup>42</sup> For example, in CDP A-1-MEN-03-029 (Claiborne and Schmitt), the Commission in 2004 approved residential development on a site that was entirely ESHA, even though it was not resource-dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

<sup>43</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* (“if regulation goes too far it will be recognized as a taking”).<sup>44</sup> Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories.<sup>45</sup> First, there are the cases in which government authorizes a physical occupation of property or actually takes title.<sup>46</sup> Second, there are the cases whereby government regulates the use of property such that the regulation has unfairly singled out the property owner to bear a burden that should in all fairness be borne by the public as a whole.<sup>47</sup> A taking may be less likely to be found when the interference with property “arises from some public program adjusting the benefits and burdens of economic life to promote the common good” (in other words, application of a regulatory program) rather than a physical appropriation.<sup>48</sup>

In its recent takings cases, the Supreme Court has identified two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first involves regulations that compel the property owner to suffer a physical “invasion” of property.<sup>49</sup> The second involves regulation that denies all economically beneficial or productive use of property.<sup>50</sup> Courts have recognized, however, that government land-use regulations result in a taking only under extraordinary circumstances.<sup>51</sup> The *Lucas* court emphasized that a regulation resulting in *no* permitted productive or economically beneficial use of land is an “extraordinary circumstance” and a “relatively rare situation.”<sup>52</sup>

Outside of the “total” categorical takings identified in *Lucas*, courts have “generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries.”<sup>53</sup> The *Penn Central* court identified several factors for determining whether a regulation has gone “too far,” including: an examination into the character of the government action; its economic impact; and its interference with reasonable, investment-backed

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<sup>44</sup> (1922) 260 U.S. 393, 415.

<sup>45</sup> See *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523.

<sup>46</sup> See, for example, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426.

<sup>47</sup> See, e.g., *Penn Central Transportation C. v. NYC* (1978) 438 U.S. 105, 123-25 (“Penn Central”).

<sup>48</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18.

<sup>49</sup> *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.

<sup>50</sup> *Id.*, at p. 1014.

<sup>51</sup> See, e.g., *U.S. v. Riverside Bayview Homes* (1985) 474 U.S. 121, 126 [“governmental land-use regulation may under extreme circumstances amount to a ‘taking’ of the affected property”].)

<sup>52</sup> *Lucas, supra*, 505 U.S. at 1017-18. Even when a challenged regulatory act prohibits all economically beneficial use of land, 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. (*Id.* at pp. 1028-32.)

<sup>53</sup> *Penn Central, supra*, 438 U.S. at 124.

expectations.<sup>54</sup> In sum, where physical occupation of land is not an issue, the *Lucas* “denial of all economically beneficial or productive use of land” test and the *Penn Central* multi-factor inquiry constitute the “two basic forms of regulatory taking.”<sup>55</sup>

### **Final Government Determination Required (“Ripeness”)**

Before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, however, 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.<sup>56</sup> Premature adjudication of a takings claim is highly disfavored, and the Supreme Court’s cases “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.”<sup>57</sup> 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.<sup>58</sup>

In this case, and as discussed further below, because the LCP instructs the Commission to deny *any* non-resource-dependent development that would be located in ESHA, the Commission’s denial of the single-family residence proposed here would similarly mean that any subsequent resubmitted application by the Applicant for any development which is a principally-permitted use would be futile because the LCP would again require project denial (because none of the principally-permitted uses for the parcels at issue are resource-dependent uses). However, as discussed further below, the subject property is planned and zoned for residential use, and to deny the Applicant a residential use of the parcel would significantly limit economic use of the property, thus resembling a *Lucas*-type “denial of all economically beneficial or productive use of land” takings situation. In these circumstances, the Applicant could potentially successfully argue that the Commission has made a final and authoritative decision about the use of the subject property. Therefore, the Applicant could successfully argue that the Commission’s denial is a taking because a taking claim is “ripe.”

### **Determination of Unit of Property Against Which Takings Claim Will be Measured**

As a threshold matter, before a taking claim can be analyzed, it is necessary to define the parcel of property against which the taking claim will be measured. In takings jurisprudence this is known as the “denominator” or “unitary theory” issue. In determining the unit of property against which a takings claim will be measured, courts will consider how the property owner and the government treat and have treated the subject property, using the following relevant, non-exclusive factors: the degree of contiguity; the dates of acquisition; the extent to which the parcel has been treated as a single unit; and the extent to which the restricted lots benefit the unregulated lot. (*District Intown Properties v. District of Columbia* (1999) 198 F.3d 874, 880.) According to one of the most recent cases on the denominator/unitary theory issue from the

<sup>54</sup> *Id.*, at p. 124; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005.

<sup>55</sup> *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 648 [Ginsburg dissenting opinion].

<sup>56</sup> For example, see *Williamson County Regional Planning Com. v. Hamilton Bank* ((1985) 473 U.S. 172, 186), and *MacDonald, Sommer & Frates v. County of Yolo* ((1986) 477 U.S. 340, 348 (“Macdonald”)).

<sup>57</sup> *MacDonald, supra*, 477 U.S. at p. 351.

<sup>58</sup> See, e.g., *Id.*

Federal Circuit of Appeals, the critical factor in making the determination is “the economic expectations of the claimant with regard to the property.” (*Lost Tree Village Corp. v. U.S.* (2013) 707 F.3d 1286, 1293.) This factor appears to be coextensive of the “extent to which the parcel has been treated as a single unit” factor discussed above.

In this case, the Applicant owns the two subject vacant parcels proposed to be developed with a single-family residence (APNs 243-251-012 and 243-251-013). Mr. Wang purchased the two parcels (at the same time) for \$4,900,000 from the Sheldon Laube and Nancy Laube Trust on May 20, 2014, and a Grant Deed was recorded as Document 2014024515 of the Official Records, Monterey County Recorder’s Office, effectively transferring and vesting fee-simple ownership to the Applicant. The parcels had also previously been transacted as one single property when Mr. Laube and Dr. Engel purchased them from Robert and Marilyn Fisher in 1999 (Grant Deed recorded on April 27, 1999 as Document 9931797 of the Official Records, Monterey County Recorder’s Office).

The adjoining neighboring parcels are owned by others. The adjoining parcel directly to the south (APN 243-251-011) is owned by Mitzi Marie Waters. The parcel to west and north (243-251-014) is owned by the State Coastal Conservancy.

Therefore, the evidence establishes that the Commission should treat APNs 243-251-012 and 243-251-013 as a single parcel for the purpose of determining whether a taking occurred. The parcels upon which the development is proposed are directly adjoining (degree of contiguity). Furthermore, Mr. Wang purchased the two parcels at the same time in 2014 (dates of acquisition). Finally, not only did Mr. Wang purchase the two parcels at the same time, but the previous owners (Mr. Laube and Dr. Engel) also purchased the two parcels at the same time, and a lot line adjustment to *combine* the two parcels has been a component of this project since its original approval in 1977 (the extent to which the parcel has been treated as a single unit and the economic expectations of the claimant with regard to the property). Therefore, the Commission should consider the two parcels as a single unit for the purpose of determining whether a taking has occurred.

### **Reasonable Residential Development to Avoid a Taking**

#### ***Categorical Taking***

Section 30010 of the Coastal Act provides that the Coastal Act shall not be construed as authorizing the Commission to exercise its power to grant or deny a permit in a manner which will take private property for public use. Application of Section 30010 may justify approval of a project on the narrowest grounds to avoid an unconstitutional taking of property without just compensation in some instances. The subject of what government action results in a “total categorical taking” was addressed by the U.S. Supreme Court in *Lucas*.

In *Lucas*, the Court held that where a permit applicant has demonstrated that he or she has a sufficient real property interest in the property to allow the proposed project, and that project denial would deprive his or her property of all economically viable use, then denial of the project by a regulatory agency might result in a taking of the property for public use, unless the proposed project would constitute a nuisance under State law.

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if an applicant demonstrates that Commission denial of the project would deprive his or her property of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act or LCP provision would otherwise prohibit it, unless restrictions on the proposed project inhere in the title of the property. In other words, unless the proposed project would be inconsistent with background principles of State property and nuisance law, the applicable provisions of the certified LCP cannot be read to deny all economically beneficial or productive use of land because these sections of the certified LCP cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property owner of some economically viable use.

Title 20 of the Monterey County LCP provides the principal permitted uses in both the Rural Density Residential (RDR) zoning district and the Watershed and Scenic Conservation (WSC) zoning district, which are essentially the same and include: single family residences; guesthouses; rooming and boarding of not more than two persons; accessory structures and accessory uses to any principal use; temporary residences; cultivation, cutting, and removal of Christmas trees; small family day care homes in existing structures; licensed residential care homes for aged persons or hospices; water system facilities including wells and storage tanks; animal husbandry and small livestock farming; all agricultural uses on a minimum of ten acres; home occupations; stands for the sale of agricultural products grown on the premises; crop farming, tree farming, viticulture and horticulture; intermittent livestock farming or animal husbandry; tract sales or rental offices; farm employee housing facility; and second residential units.

The Commission finds that in this particular case, none of the other permitted uses at the subject property would avoid constituting non-resource dependent development in ESHA while at the same time providing the property owners with a reasonable investment backed and economically viable use. Other allowed uses (as a matter of zoning), such as care facilities and agriculture would fundamentally be in conflict with LCP ESHA policies, as is the case with a small single-family residence.

Thus, the Commission finds that it is reasonable to conclude that denial here could be determined to deprive the Applicant of all economically viable use of his property. In fact, LCP ESHA policies prohibit *any* development on the property other than resource-dependent development such as trails or other interpretive elements. Resource-dependent options would appear to not provide an economically viable or productive use of the subject property consistent with the applicant's investment-backed expectations at the current time. Therefore, regardless of whether denial of the permit would constitute a taking under the *ad hoc* inquiry required by *Penn Central* (as discussed below), the Commission finds it likely necessary to approve some residential use of the property to avoid a categorical *Lucas*-type taking.

#### ***Taking Under Penn Central***

Although staff concludes that it is necessary to approve some residential use to avoid a categorical taking under *Lucas*, a court may also consider whether the permit decision would

constitute a taking under the ad hoc inquiry stated in *Penn Central*.<sup>59</sup> This ad hoc inquiry generally requires an examination into factors such as the sufficiency of the applicant's property interest, the regulation's economic impact, and the regulation's interference with reasonable, investment-backed expectations.

*Sufficiency of Interest*

The Applicant purchased APNs 243-251-012 and 243-251-013 for \$4,900,000 with a closing date of May 20, 2014 and a Grant Deed was recorded as Document 2014024515 of the Official Records, Monterey County Recorder's Office, effectively transferring and vesting fee-simple ownership to the Applicant, Brandon Wang. Upon review of these documents, Commission staff concludes that the Applicant has demonstrated that he has sufficient real property interest in the subject parcel to allow pursuit of the proposed project.

*Reasonable Investment-Backed Expectations*

In this case, the Applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence. To determine this, it is necessary to assess what the Applicant invested when he purchased the lot. To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the Applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

The Applicant purchased APNs 243-251-012 and 243-251-013 for a single purchase price of \$4,900,000. This price is comparable to what other parcels of a similar size in the Rocky Point residential area sold for in the same general timeframe as when the Applicant purchased the subject property. For example, a neighboring property to the north (35986 Highway 1, APN 243-231-025), which is two acres, sold for \$5,720,000 in 2010 (according to Realquest.com). The adjacent 2.9-acre parcel to the south of the Applicant's property (36240 Highway 1, APN 243-251-011) sold in 2005 for \$3,200,000. Both of these adjacent parcels were developed with single-family residences at the time of purchase.

When the Applicant purchased the property in 2014, a long and publicly-available land use entitlement and legal history existed for the site. Beginning in 1977, one of the Applicant's predecessors-in-interest (Sorenson) applied for and obtained CDP approval for a single-family residence on the property. The Commission subsequently certified Monterey County's Big Sur Area LCP in 1986, which designated the southern parcel as RDR and included it as a vacant residential parcel in the Rocky Point critical viewshed exception area, thereby allowing for relaxed development restrictions related to the viewshed. In 2004, the Applicant's most recent predecessors-in-interest, Laube and Engel, applied for and obtained a new CDP approval for a single-family residence on the site. However, as detailed in this report, the subsequent lawsuit brought by Appellant Dr. Hugh McAllister resulted in the need for additional review by the Commission before final approvals could be granted. Notably, for purposes of this reasonable expectation analysis, the Court decision in the Laube and Engel case<sup>60</sup> does not dispute or

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<sup>59</sup> (1978) 438 U.S. 104, 123-125.

<sup>60</sup> McAllister v. Cal. Coastal Comm'n (2008) 169 Cal.App.4th 912.

question the LCP's residential zoning designation of the site. The Court was more specifically concerned with the Commission's approval of a residence on the site without making the proper findings with respect to ESHA to approve the proposed residence on a takings basis. The Commission found that the site was ESHA but allowed a non-resource-dependent use (i.e., a residence) on a takings basis without resolving the policy conflict, thereby running afoul of Coastal Act and LCP ESHA protections. The Court then remanded the matter back to the Commission to resolve this issue but did not imply that a residential use on the site was precluded by the ESHA policies, just that the project needed to be properly evaluated if done so on the basis of a takings approval. That is what this staff report now accomplishes.

A reasonable person, conducting due diligence before purchasing this property, would have had full knowledge of these proceedings and the Court's 2008 findings and decision before purchasing the property and requesting to return to the Commission for approval of the proposed project. In addition, when the Applicant purchased the property in 2014, most of the RDR-designated parcels in the immediate vicinity had been developed and a prospective purchaser would have likely had knowledge of the designation of the southern parcel as a critical viewshed exception area in the LCP (in other words, that the southern parcel was within this area where residential development is specifically allowed by the LCP). In sum, although the property's development constraints and regulatory hurdles with respect to ESHA and the viewshed would have been apparent when conducting due diligence on this property, evidence is also ample to suggest that a prospective purchaser could have and likely reasonably believed the property would be developable with a single-family residence at the time of purchase. In other words, a potential purchaser of this property in 2014 likely had a reasonable investment-backed expectation that he had purchased a lot that could be developed with a residence, and his investment was made under the assumption that the future development of a residential use could be approved on APN 243-251-012. Given that other homes were in existence along the seaward side of Highway 1 in the Rocky Point RDR-zoned area at the time of the property purchase, given that the property was zoned for residential use, and given that the recent court decision did not preclude residential development, viewed objectively, a reasonable person could thus have had a reasonable expectation that APN 243-251-012 could be developed as a residential parcel.

The *Penn Central* inquiry looks to a purchaser's expectations at the time of purchase; as such, staff researched the current size and bulk of existing homes in the area. To assess whether the Applicant had a reasonable expectation to build a 2,315-square-foot house on the subject property, Commission staff calculated the average square footage of homes and the average residential lot size of the 20 developed parcels located seaward of Highway 1 in the Rocky Point residential area (i.e., between Garrapata Creek to the north and Rocky Point Restaurant to the south). The average square footage of these 20 homes is 3,180 square feet. The average lot size of these 20 developed parcels is 2.36 acres. The Applicant is proposing a house that is smaller than the average home in the vicinity of the project site. The Applicant is also proposing to merge the two parcels he owns, which, when merged, would be significantly larger than the average-sized residential parcel in the area. Also, given their proximity, it is likely that the nearby developed properties contain similar sensitive habitat as the Applicant's property. Thus, a purchaser of the subject parcels would have had a reasonable expectation that he or she could build on the site. It can be argued that a reasonable person would have had a reasonable, investment-backed expectation to build a house of the size and scale as that proposed by the Applicant, given the average size of surrounding homes and lots.

*Economic Impact*

In this case, the evidence in the record suggests that Commission denial of any residential development on this parcel would likely have a substantial impact on the value of the subject property, as well as the Applicant's investment backed expectations.

Considering the above, to preclude a claim of a taking and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, staff recommends approval of a CDP to allow for the construction of the proposed residential development to provide a reasonable economic use of the subject property. This determination is based on the finding in this report that some form of residential development is commensurate with the investment-backed expectations for the property, and that there are no other uses allowable on these sites, given that they are nearly entirely ESHA, that would be expected to provide an adequate economic use.

**Background Principles of State Property Law to Avoid a Taking**

As an alternative basis for avoiding a taking of property, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation.<sup>61</sup> These background principles include a State's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, it does not appear that the proposed project would constitute a public nuisance, or that other background principles of real property law are implicated, so as to preclude a finding that the Commission's denial of the project would constitute a taking.

California Civil Code Section 3479 defines a nuisance as follows:

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

California Civil Code Section 3480 defines a public nuisance as follows:

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

There is no evidence that construction of a residence on the subject property would create a nuisance under California law. The site is located in a rural residential area where some form of small-scale single-family residential development would be compatible with adjacent land uses to the north and south. Additionally, water service will be provided to the single-family residential development by Cal-Am, who has confirmed that there is service available for the property, and wastewater will be treated onsite pursuant to Monterey County Department of

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<sup>61</sup> *Lucas, supra*, 505 U.S. at pp. 1029-30.

Environmental Health standards. This ensures that the proposed new residence would not create public health problems in the area. Furthermore, the proposed use is residential, rather than, for example, industrial, which might create noise or odors or otherwise create a public nuisance. It also appears that development can be sited, designed, and conditioned at this location in such a way as to avoid becoming damaged and falling into the ocean, or to be removed if this were to occur, which if this occurrence could not be avoided might suggest a public nuisance (due to debris, as well as impacts from severed infrastructure, etc.).

Therefore, the Commission finds an appropriately conditioned single-family residence would not constitute a public nuisance that would preclude a finding that the regulatory action constitutes the taking of private property without just compensation.

### **LCP Takings Provision**

The Monterey County LCP addresses the findings necessary to approve development on a takings basis. Specifically, Section 20.02.060 of the CIP states:

#### ***20.02.060 CONSISTENCY WITH ADOPTED PLANS.***

*A. No building permit, grading permit, land use discretionary permit, coastal administrative permit, coastal development permit, exemption, categorical exclusion, or other permit relative to land use may be approved if it is found to be inconsistent with the Monterey County Local Coastal Program.*

*B. An exception to the finding required in Section 20.02.060.A may be considered by the Board of Supervisors on appeal, if it is found that the strict application of the area land use plan policies and development standards of this ordinance denies all reasonable use of the subject property. The exception may be granted only if the decision-making body is able to make the following findings:*

*a. that the parcel is otherwise undevelopable due to specific policies of the applicable land use plan and development standards of this ordinance, other than for reasons of public health and safety;*

*b. that the grant of a coastal development permit would not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and land use designation in which the subject property is located;*

*c. that the parcel is not located within the critical viewshed of Big Sur as defined in Section 20.145.020 and Section 20.145.030 and in the Big Sur Land Use Plan;*

*d. that any development being approved is the least environmentally damaging alternative project. In order to make this finding, the development shall be required to minimize development of structures and impervious surfaces to the amount needed to reduce environmental impacts to the greatest extent possible and shall be required to locate the development on the least environmentally sensitive portion of the parcel;*

*e. that any development being approved under these provisions shall be one of the "allowable uses" as listed under the parcel's zoning classification and that it shall be appealable to the California Coastal Commission in all cases.*

Under CIP Section 20.02.060, a CDP cannot be approved here for the proposed development due to the irreconcilable inconsistencies of allowing for a residence within ESHA, contrary to LCP ESHA policies. However, the findings required by CIP Section 20.02.060.B to approve the proposed residence (on the basis that strict application of the LCP ESHA policies would deny all reasonable use of the property and thus amount to a taking of private property) can be made.

First, as clearly established in this report, the parcel is otherwise undevelopable due to specific LCP ESHA policies which prohibit non-resource dependent uses within ESHA. As specified in the site's land use and zoning designations, all allowable uses here constitute non-resource dependent uses. Second, the grant of a CDP here would not constitute a grant of special privileges inconsistent with limitations upon other properties in the vicinity and land use designation in which the subject property is located because neighboring properties similarly have been allowed single-family residences of a similar development footprint as the proposed project. In addition, other similarly-situated properties within ESHA would be subject to the same Coastal Act and constitutional law considerations as the current proposal.

Third, as discussed above, the proposed development is not visible within the critical viewshed,<sup>62</sup> considering that the majority of the proposed residence is situated on the southern parcel which is within the critical viewshed exception area and the small northeastern corner of the structure that is located on the northern parcel that would otherwise be subject to the critical viewshed policies is consistent with the limitations on development in those locations because it is screened by the knoll and Monterey cypress trees such that no portion of the proposed residence is visible within the critical viewshed. Fourth, as discussed below in Section L (Approvable Project), the approved development is the least environmentally damaging alternative project as

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<sup>62</sup> Although CIP Section 20.02.060.B.c requires a finding "that the parcel is not located within the critical viewshed of Big Sur as defined in Section 20.145.020 and Section 20.145.030 and in the Big Sur Land Use Plan," this language should be interpreted as meaning "that the proposed development is not visible within the critical viewshed," not "that the physical parcel is prohibited from being within the critical viewshed." Staff acknowledges that this language is less than clear and that the LCP should be revised to clarify its meaning, but that a literal interpretation would result in internal LCP inconsistency. Many parcels in Monterey County are physically located within the critical viewshed, but the LCP has allowed and would allow for development such as the proposed residence here so long as the proposal is consistent with applicable LCP policies (e.g., Rocky Point and Otter Cove). Therefore, it makes no sense that CIP Section 20.02.060.B.c would preclude approval of development within the critical viewshed in order *to avoid infringement of constitutional property rights*, but the LCP would otherwise allow approval of development within the critical viewshed when there are *no* constitutional concerns. This point is illustrated by the fact that "exception areas" (such as Rocky Point and Otter Cove) within the critical viewshed allow for certain types of development with comparatively relaxed development standards. In implementing the Monterey County LCP, the County and the Commission, must try to harmonize all policies of the LCP to avoid an interpretation that results in internal inconsistencies within the LCP. Therefore, CIP Section 20.02.060.B.c should be interpreted to apply only when development cannot be approved consistent with the critical viewshed policies laid out in the LCP. Under this interpretation, development that was otherwise inconsistent with the critical viewshed policies of the LCP could not be approved, even to avoid a taking. In this case, the development is consistent with the critical viewshed policies, so no takings override is necessary to address viewshed consistency. Thus, CIP Section 20.02.060.B.c does not apply to prevent approval of the proposed development.

it has been modified and conditioned to reduce impacts to coastal resources to a level of less than significant. Fifth, the approved development is an allowable use as listed under the parcel's zoning classification.

### **Takings Conclusion**

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, staff recommends approval of a CDP to allow for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence, there is a reasonable possibility that a court might determine that the Commission's denial of a residential use, based on the inconsistency of this use with the LCP, would constitute an unconstitutional taking without compensation (since reapplication would be futile). Therefore, the Commission determines that the inconsistency with the County's LCP in this case does not preclude a residence that is appropriately conditioned to minimize coastal resource impacts and LCP inconsistencies as much as possible on the basis of potential takings.

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

## **L. APPROVABLE PROJECT**

### **Maximizing LCP Conformity while Avoiding Takings**

Though applicants are entitled under Coastal Act Section 30010 to an assurance that the Commission will not act in such a way as to result in an unconstitutional taking of their property, this section does not authorize the Commission to otherwise abandon prior application of the policies and standards of the certified LCP and the Coastal Act to otherwise ensure utmost consistency with coastal resource policies, including LCP policies related to coastal hazards and visual and scenic resources, for example. Instead, the Commission is only directed to avoid construing these otherwise applicable policies in a way that would unconstitutionally take private property for public use. Aside from this limitation, the Commission is still otherwise directed to enforce the requirements of the LCP and the Coastal Act as applicable. Therefore, in this situation, the Commission must still comply with otherwise applicable LCP and Coastal Act policies by requiring measures to mitigate adverse environmental effects (including on ESHA, visual resources, coastal hazards, water resources, and archaeology) from the development of the proposed single-family residence.

### **Minimizing Adverse Coastal Resource Impacts**

To achieve consistency with the LCP's policies in light of constitutional takings issues, staff recommends that the Commission approve development of a modified single-family residence with special conditions to minimize adverse effects on ESHA, visual resources, coastal hazards, water resources, and archaeology.

To help identify an appropriate footprint area and project, Commission staff analyzed the four-

acre property and its characteristics against LCP requirements and the existing legal framework for the site, as well as the characteristics of the surrounding residential properties. Almost the entirety of the Applicant's four-acre property is considered ESHA and a large portion (approximately 70%, all on the northern parcel) is burdened by an existing easement that protects the scenic and open space values of the property, as well as provides for public access and archaeological resource protection. In addition, the two-acre northern parcel is within the critical viewshed (and not within the critical viewshed exception area as is the southern parcel), where the LCP prohibits visible development. Furthermore, another portion (approximately 30%) of the site is undevelopable rocky blufftop. As such, the site is highly constrained and the area for potential development is limited by geographic conditions and existing legal requirements. The Applicant proposes to site the residence on the portion of the site that was already graded by a previous owner and remains generally flat and degraded with little vegetation and existing concrete foundation remnants. Although the building pad area is within the northern coastal bluff scrub ESHA, which contains seacliff buckwheat, this portion of the site is located seaward of the knoll and thus is out of public view from Highway 1 and the critical viewshed, is also outside the existing easement area. In addition, the existing graded driveway, which already provides access to the building pad area, is outside the existing easement area as well. Residential (or any other type of development) on any other portion of the four-acre site would not be appropriate or allowable by the LCP or the existing easement. The siting of the single-family residence on the most level, denuded, and topographically screened portion of the lot allows for a reasonable economic use of the property while ensuring that the project is as consistent as possible with the ESHA and visual protection policies of the LCP. Thus, although the proposed development constitutes ESHA, locating the development there and using the existing driveway alignment represents an appropriate compromise to otherwise maximize LCP and Coastal Act consistency given the takings considerations and physical characteristics of the site.

As described above, the average size of residences in the Rocky Point residential area is 3,180 square feet with homes ranging from 784 square feet to 9,255 square feet on similarly sized, but mostly smaller, lots than the Applicant's (once merged). At 2,315 square feet (not including courtyards or the garage/mechanical room), the Applicant's residence would be consistent with the size of other homes in the area. As a single-story structure, it has been designed to not intrude on the viewshed by utilizing the existing graded area that is seaward of the knoll. The proposed project does not require excavation of the adjacent knoll or other additional significant grading of the site. The two-bedroom/two-bath home includes features such as deployable wall-sized shutters that, when open, will act as decking when the residence is in use, thus reducing its overall footprint and massing when the residence is not in use. In general, the proposed size, mass, and scale of the residence is relatively understated compared to neighboring houses and is consistent with LCP policies to minimize visual impacts, site grading, and overall development footprint. Similar to the proposed location on the site, the residence design and specifications also represents an appropriate compromise to otherwise maximize LCP and Coastal Act consistency given the takings considerations and physical characteristics of the site and surrounding area.

Even with the appropriate location, size, and design of the residence, the project will have known and potential impacts associated with ESHA, visual resources, coastal hazards, water resources, and archaeology. Thus, the Commission finds that the following special conditions are necessary to further maximize LCP and Coastal Act consistency. First, **Special Condition 1** requires

revised final plans to be submitted prior to issuance of the coastal development permit. **Special Condition 1(a)** requires Final Plans to show all development (including all structural development, the driveway and parking area, courtyards, walkways and the septic leach field area) in a defined development envelope, thus ensuring the residence is located in the minimum footprint necessary to protect ESHA (including to minimize disruption of habitat values and be consistent with the LCP's requirement to limit removal of native vegetation and land disturbance to that needed for the structural development itself) and the viewshed while still providing a reasonable economic use. The footprint must coincide with the outline of the development as shown in the project plans (**Exhibit 5a**) except that the driveway must be reduced to a 12-foot width with no gutter and the proposed 26-foot-wide turnout must be eliminated. The majority of the driveway shall be unpaved (i.e. no asphalt, concrete, or pavers), but small unconsolidated rock or gravel may be used for the driveway surface, with such or gravel matching the color of the existing soil present on the site to the greatest extent feasible. The portion of the driveway closest to Highway 1 with a grade greater than 15% may be paved with concrete with traction grooves. This concrete must also be colored to match the existing soil present on the site to the greatest extent feasible (**Special Condition 1(c)**).

Consistent with the LCP's requirements for compatibility with the long-term maintenance of adjacent ESHA and use of appropriate native species in landscaping, **Special Condition 1(f)** requires all nonnative and invasive plants to be removed from the site and the portion of the site located within the defined development envelope to be landscaped with drought-resistant native species. Outside of the development envelope, **Special Condition 4** requires preparation and implementation of a habitat restoration plan for the site (including the Highway 1 Caltrans right-of-way) that involves restoration of the native habitats (northern coastal bluff scrub, coastal scrub, and coastal sagebrush scrub) on the site. **Special Condition 14** requires a conservation easement over those portions of the property not already covered by the existing scenic and conservation easement and not within the approved development envelope to ensure permanent protection of all ESHA on the property.

**Special Condition 1(g)** requires a grading plan that limits grading activities to the development envelope, and **Special Condition 1(h)** requires stormwater and drainage infrastructure and related water quality measures, with preference given to natural BMPs (e.g., onsite runoff retention, etc.), to minimize any adverse impacts to the adjacent ESHA and the marine environment. Such infrastructure and water quality measures shall provide that all project area stormwater and drainage is: filtered and treated to remove expected pollutants prior to discharge to protect coastal resources as much as possible. The condition requires runoff from the project to be retained onsite to the maximum extent feasible. Infrastructure and water quality measures shall be sized and designed to accommodate runoff from the site produced from each and every storm event up to and including the 85th percentile 24-hour runoff event, which is a standard water quality protection metric. Finally, consistent with LCP requirements to protect adjoining habitat, **Special Condition 5** requires pre-construction monitoring and protection measures for black swifts and any other nesting birds during construction.

With respect to visual resources, to ensure compatibility with LCP requirements to screen development and minimize views as much as possible, **Special Condition 1(b)** requires the residence to extend no higher than 14 feet as measured from average natural grade and allows for an additional 18 feet in height for the two proposed chimneys as shown on the project plans

(**Exhibit 5**). In addition, **Special Condition 6** requires protection of the existing Monterey cypress trees during construction and replanting of any cypress trees that die, are damaged, or grow such that they no longer screen the development.

With respect to the driveway, although the Applicant indicates that the proposed large-scale open-joint stone pavers with gravel infill would be similar in appearance to the existing rock on the site, it does not appear impractical in this case to utilize additional measures to ensure a minimum amount of paving to further protect both visual resources and water quality. To ensure additional visual compatibility with the surroundings and reduce impacts on the viewshed and allow more infiltration of rainwater, **Special Condition 1(c)** requires that the majority of the driveway consist of an unpaved double-track style at a maximum width of 12 feet, with a vegetated middle strip and native landscaping along the edges of the driveway to soften its appearance. This condition allows the surface of the driveway outside of the vegetated strip to be surfaced with small rocks or gravel of a color similar to the soil in the area. The portion of the driveway near Highway 1 that has a grade of greater than 15% may be paved with concrete (colored to match the surrounding soil) with traction grooves. **Special Condition 1(d)** requires relocation of the existing Highway 1 gate further westward approximately 20 feet down the driveway (at approximately the 115-foot contour line), thereby reducing visibility of the gate from Highway 1. This condition also limits gate height to five feet, and requires a see-through ranch-style design (like the existing entrance gate at the site). In addition, **Special Condition 1(d)** also requires removal of the second existing gate that is located adjacent to the knoll to eliminate unnecessary visual clutter and allow the project to better blend into the natural environment. To further protect the natural visual resources of the area, the final plans must also indicate that no permanent fencing is allowed on the property (**Special Condition 1(j)**).

As described previously, the site is not without hazards risk. The proposed project is located in an area that is subject to coastal hazards due to the inherent nature of its blufftop location. As described in the ‘Coastal Hazards’ section above, the Commission finds that a range of potential erosion and setback scenarios exist and potential stability over time varies considerably at this site based on the evidence presented. The Commission’s experience in evaluating proposed developments in areas subject to hazards has been that development has continued to occur despite periodic episodes of heavy storm damage and other such occurrences. Development in such dynamic environments is susceptible to damage due to such long-term and episodic processes. Past occurrences statewide have resulted in public costs (through low-interest loans, grants, subsidies, direct assistance, etc.) in the millions of dollars. Despite these potential risks of damage, the Applicant proposes to develop the property with only a 20-foot setback from the bluff edge.

Given that the Monterey LCP does not set forth a numerical setback minimum nor a numerical “economic life of structure” standard by which to determine an adequate setback consistent with LCP coastal hazards policies, and considering the differing conclusions of the geologic reports, staff cannot conclude with certainty that the 20-foot setback is fully LCP consistent with respect to minimization of hazards to property and life. As previously discussed, erosion rates provided for the site indicate that potential stability over time may vary considerably. The original geologic report estimated coastal bluff erosion at approximately 0.36 feet on average per year, whereas the 2016 geologic report estimated an average erosion rate of 0.1 feet per year using differing methodologies, thus resulting in a possible 70 to 130 year site stability using the 0.1

feet per year assumption and a possible 19 to 36 year site stability using the 0.36 feet per year assumption (when accounting for slope stability). Given the differing conclusions of the geologic reports, neither of which is clearly preferable to the other, the Applicant has chosen to rely on the assumption that the chosen setback will provide at least a 70-year site stability. Considering the unique facts and circumstances of this specific situation (siting potential limited by existing easement, ESHA, and topography onsite; development proposal limited to existing graded area; range of potential site stability over time; assumption of hazards of risks by applicant; waiver of future shoreline protection by applicant), the Commission concludes that the project with the proposed setback is approvable on the narrow basis of avoiding an unconstitutional taking of private property. As a means of allowing development of this property to avoid a taking, **Special Condition 7** requires the Applicant to assume all risks for developing at this location and to acknowledge site hazards and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed.

The next hazards policy consistency evaluation is whether the proposed project meets LCP requirements prohibiting new development from using shoreline protective devices, both now and in the future. The project is not sited in such a manner that the Commission can find with confidence that it would not need shoreline armoring to protect it in place in the future, but the development is nevertheless being approved to avoid a taking. The Commission must still find, however, that the project is consistent with two requirements: it must not include shoreline armoring in its approved design and configuration, and it must include appropriate restrictions that prohibit armoring in the future. With respect to the former, in addition to more traditional armoring measures such as rock revetments and seawalls, the Commission has seen proposals for foundations and other structural elements designed to withstand hazards in a manner such that the structural elements themselves would constitute shoreline protection. Typically, these “superstructures” are made up of deep pier/caisson foundations. This type of support is commonly required by FEMA requirements when building within flood hazard areas, whereby components of structures are required to be elevated in such a way that habitable space is kept some distance above expected maximum flood elevations, and areas below that are not allowed to be habitable. For purposes of the County’s LCP, which does not allow shoreline protection for new development, when piers/caissons or any other type of structure serve to elevate a new structure above ocean waters and protect against erosion risks, this type of elevation allowance serves as shoreline protection, inconsistent with LUP Policy 3.9.1.1 and CIP Section 20.145.080.A.2.h. In other words, elevation coupled with foundational “superstructures” can be a type of shoreline protection, and elevation strategies aimed at protecting new development from erosion and hazards would therefore be inconsistent with LCP requirements that do not allow such protection for new development and that prevent new development in hazardous locations.

To memorialize this requirement that no portion of the residential structure itself shall act as a shoreline protective device in response to hazards, **Special Condition 1(e)** requires the construction of foundational elements that use a standard design and prohibits the use of piers and caissons and any other foundation elements that are designed or engineered to address ocean and related forces, including wave attack, ocean flooding, or erosion. Instead these ocean-related forces are to be addressed through the project’s setback and removal over time, as described below.

With respect to whether the approved project includes appropriate restrictions against future armoring, the project must be conditioned to define the specific trigger points to determine when the site is deemed hazardous and what the allowable repair and maintenance actions are to address any potential damage from coastal hazards. Clear and unambiguous language defining these trigger points is particularly important for determining when a structure is at risk, particularly when it implicates the removal of portions or even all of a single-family residence.

In order to ensure that the proposed development maintains its prohibition on shoreline armoring in the future, **Special Condition 8(b)** prohibits all shoreline protective structures, including but not limited to seawalls, revetments, groins, and caisson/grade beam systems in the event the development is threatened in the future and extinguishes any rights that may exist to construct such shoreline protective devices. **Special Condition 8(a)** articulates that the intent of the CDP is to ensure that development does not use structural armoring as a mechanism to cope with any potential coastal hazards, and that, in lieu of armoring, the response to abate such hazards is through removal and restoration over time. **Special Condition 8(c)** ensures that the development will only be allowed to remain onsite if it is safe for occupancy and use without additional measures beyond ordinary repair and maintenance and without shoreline protection. The condition is meant to define when the project (or a portion of the project) is impermissibly located within a hazardous location necessitating shoreline protection and when the project (or a portion of the project) itself is impermissibly functioning as shoreline armoring. When either or both of these situations arise, the project will then be inconsistent with LCP requirements that prevent development within hazardous locations and that do not allow new development from using shoreline protective devices to abate any coastal hazards. Specifically, the condition requires the Applicant to submit a plan for removal of development if any of three triggers is met: (1) if a government agency has ordered that any portion of the approved residence is not to be occupied or used due to one or more coastal hazards, and such government agency concerns cannot be abated by ordinary repair and/or maintenance;<sup>63</sup> (2) if any portions of the residence's major structural components, including exterior walls, floor and roof structures, and foundation, must be significantly altered (including renovation and/or replacement) to abate coastal hazards<sup>64</sup>; (3) if any portion of the approved foundation becomes visible; (4) if any portion of the cantilevered decking extends over the bluff edge; or (5) if the bluff edge recedes to within 5 feet of any portion of the development.

**Special Condition 8(c)** emanates from recent Commission actions for large shoreline resort hotel facilities<sup>65</sup> that seek to define when a development is located in a hazardous location and would need armoring, and/or when the structure itself is impermissibly acting as shoreline armoring. As previously discussed, elevation coupled with foundational "superstructures" is a

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<sup>63</sup> The condition defines "ordinary repair and maintenance" as including sealing and waterproofing repair, and/or maintenance that does not involve significant alteration to the building's major structural components, including exterior walls, floor and roof structures, and foundation.

<sup>64</sup> The condition defines "exterior wall major structural components" as including exterior cladding and/or framing, beams, sheer walls, and studs; "floor and roof structure major structural components" as including trusses, joists, and rafters; and "foundation major structural components" as including any portion of the mat foundation, retaining walls, columns, and grade beams.

<sup>65</sup> Including for A-3-SNC-98-114 (Monterey Bay Shores Resort), approved by the Commission in April 2014.

form of shoreline protection when it functions in this way; that is, when it is meant to protect against erosion and other coastal hazards. Therefore, **Special Condition 8(c)(iii)** articulates that if any of the approved foundation and/or subsurface elements become visible, then these elements shall be screened, and if such screening is not possible, that these elements be removed.

Furthermore, **Special Conditions 8(c)(i)** and **(ii)** define when the project site is subject to hazards at a frequency and/or magnitude at which the site would be deemed hazardous and therefore when it would require shoreline protection. The condition defines the point at which this determination would be made by the extent of damage, and the resultant type of necessary repair work, caused by coastal hazards. The condition specifies that ordinary repair work, including waterproofing and alterations to non-structural components, would be authorized. Thus, if high seas and waves from a large storm caused some minor damage to the structure, but that damage was very minimal and addressed by simple repair work, then such a situation does not rise to the threshold for deeming the site hazardous and unsafe for continued use and/or requiring shoreline protection. However, when the hazard causes enough damage that significant alteration, including replacement, of the residence's major structural components is necessary, then the site is subject to hazards at a level unsafe for continued human use and occupancy without some type of shoreline protection.

Essentially, the amount/level of repair work defines the point at which the site is deemed hazardous. When hazards are infrequent and/or weak enough to where simple repair work is needed, such work is allowed. Conversely, if such hazards are strong and/or frequent enough in which major repair work to fix damaged structural elements is necessary, the trigger point for determining that the development is located in an LCP impermissible hazardous site has been reached, and therefore removal of the affected portion of the development must take place. Allowing for repair work from a coastal hazard event(s) that is strong/frequent enough in which the residence's major structural elements, including its foundation and/or wall studs, are damaged to an extent at which such elements would need to be replaced is a trigger point that defines when allowing such work would inappropriately perpetuate structural development and human occupancy within a hazardous location absent some type of shoreline protection. With respect to what defines and differentiates ordinary repair and/or maintenance versus major structural alteration, the condition is modelled after language approved in recent LCP updates which indicate the direction that the Commission is heading on this issue, including for Solana Beach<sup>66</sup> that differentiated between these two types of repair work, including by specifying the types of building components that would be considered structural.

**Special Condition 8(c)(v)** specifies another trigger point for preparation of a Removal and Restoration Plan (RRP), that is in the event that the edge of the blufftop recedes to within five feet of the approved development. In that case, the (RRP) must address the threat and identify measures that could stabilize the development without shoreline armoring, including potential removal of the entire structure. **Special Condition 8(c)(iv)** requires removal of any portion of the cantilevered deck that, over time, might extend past the edge of the bluff. Therefore, **Special Condition 8(c)** is informed by recent Commission actions on both relevant LCPs and CDPs to

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<sup>66</sup> Marin County LCP Amendment LCP-2-MAR-13-0224-1 Part A (Marin LUP Update), approved by the Commission in May 2014; City of Solana Beach Land Use Plan, approved by the Commission in March 2012; and City of Solana Beach LCP Amendment SOL-MAJ-1-13, approved by the Commission in January 2014.

define when the site is hazardous and would need structural protection, and/or when the structure itself is acting as impermissible shoreline protection, and thus, in either case, when the structure must be removed and the site restored.

With these conditions, the development will not utilize shoreline protection now or in future, and will instead abate potential future hazards through removal and site restoration when defined trigger points are reached. Therefore, with respect to shoreline erosion and related coastal hazards, the project, as conditioned, is consistent with applicable LCP hazard policies to the maximum extent possible while avoiding a taking.

To provide consistency with the performance standards of the LCP, **Special Conditions 2 and 3** require submission of a construction plan to ensure Best Management Practices (BMPs) are implemented during construction to avoid water quality and other coastal resource impacts during construction, to require that copies of the CDP and the approved construction plan be maintained at the site during construction, and to require a construction coordinator to be available to respond to any inquiries that arise during construction.

The proposed project does not incorporate any water conservations measures as required by the LCP. As such, the potential exists for impacts to the water system and to Garrapata Creek resources, which can be reduced through reasonable and feasible mitigation measures. **Special Condition 1(k)** addresses this by requiring the final plans to include various water conservation features including, but not limited to, on-demand water heaters, high-efficiency low-flush toilets, low-flow showerheads, and drip or micro-spray irrigation.

Because the site contains known archaeological resources, **Special Condition 10** requires monitoring by the appropriate Ohlone Costanoan Esselen Nation member(s) during all grading, excavation work, site preparation, and landscaping activities on the site. If additional cultural resources are discovered, the Applicant is required to cease work and prepare a plan that identifies measures to be undertaken to determine the significance of the find, which is then reviewed by the Executive Director. If significant, an additional plan is to be prepared that recommends methods to protect the resource(s).

The Commission's action on this CDP has no effect on conditions imposed by Monterey County pursuant to an authority other than the Coastal Act. Thus, **Special Condition 9** specifies that in the event of conflict between the terms and conditions imposed by the local government pursuant to an authority other than the Coastal Act/LCP and those of this CDP, the terms and conditions of coastal development permit A-3-MCO-04-012 shall prevail.

Coastal Act Section 30604(c) requires that every CDP issued for any development between the nearest public road and the sea "include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3." The proposed single-family residence would be located seaward of the first through public road and thus such a finding is required for a CDP approval. Coastal Act Sections 30210 through 30213 and 30221 specifically protect public access and recreation. The LCP includes policies with similar requirements. These overlapping policies protect the existing public access on the site as well as the public access provided on the adjacent State Coastal Conservancy property.

The proposed project will maintain existing access within the existing easement area on the property and includes a new lateral trail easement area at the base of the hillslope below Highway 1 to provide for a future segment of the California Coastal Trail. To memorialize the lateral trail easement aspect of the proposed project, **Special Condition 11** provides for recordation of an offer-to-dedicate a public access easement in the area depicted on **Exhibit 5a** and as referenced in **Special Condition 1(i)**, and provides for the recordation of a document granting or irrevocably offering to dedicate either fee title or an additional easement for this portion of the property.

The proposed project also includes a merger of the two project parcels into one. To memorialize this aspect of the project, **Special Condition 12** requires evidence from the County that the lots have been properly merged and recorded as a single parcel of land.

Finally, to ensure that future property owners are properly informed regarding the terms and conditions of this approval, this approval is also conditioned for a deed restriction to be recorded against the property involved in the application (see **Special Condition 13**). This deed restriction will record the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

The Commission finds that, as conditioned, the project represents a reasonable use of the property (on a site that would otherwise prohibit residential use) that will avoid an unconstitutional taking of private property for public use, will avoid coastal resource impacts and provide consistency with the LCP and the Coastal Act to the maximum extent feasible, and appropriately responds to the unique circumstances of this case.

## **M. VIOLATIONS**

Violations of the Coastal Act and LCP exist on the subject property including, but not limited to, prior grading of the driveway, installation of concrete gutters along the driveway, excavation and grading of the building pad, installation of a septic holding tank, drainage facilities, and the water system hookup. The Commission's 1977 approval of CDP A-174-77 (Sorenson SFD) included a condition (Special Condition 3) that required consolidation of the two project parcels (APNs 243-251-012 and 243-251-013) prior to commencement of grading or construction. The parcel consolidation never occurred, and yet Mr. Sorenson began site clearing, excavation, grading, and utility installation at some point in the late 1970s/early 1980s. When Mr. Laube and Dr. Engel purchased the property in 1999, they did so with the unpermitted development present on the site. The Commission's 2004 approval was intended to resolve these violations, but because that approval was challenged in court, the CDP was not issued, and the violations remain. More recently, in 2009 and 2013, the Commission opened enforcement cases for additional alleged unpermitted development on the property, including: vegetation removal, installation of decomposed granite over the existing driveway, installation and maintenance of new gate(s), installation of an irrigation system, and the planting of cypress trees. Commission staff determined that much of this new development occurred on the subject site.

Essentially, all development that has occurred on the subject property has been undertaken without valid CDP approval(s). When the Applicant purchased the property in 2015, he acquired the property with these violations in place. Issuance of this CDP, and compliance with all of the

terms and conditions of this permit, will result in resolution of the aforementioned violations of the Coastal Act and/or the LCP on the subject property. Specifically, the proposed development will utilize and improve the existing driveway alignment and building pad area; the existing septic tanks and drainage features will be removed and repositioned elsewhere on the site; the concrete gutters along the driveway will be removed; the water system connection will be utilized by the proposed residence; the planted cypress trees will remain and will provide some visual screening of the residence from Highway 1; the second gate halfway down the driveway will be removed; and the entire site will be restored to native habitat with some temporary irrigation as needed.

Although development has taken place prior to submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act and the policies of the Monterey County LCP. Commission review and action on this CDP does not constitute a waiver of any legal action with regard to the alleged violations, nor does it constitute an implied statement of the Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject site without a CDP. In fact, approval of this permit is possible only because of the conditions included herein and failure to comply with these conditions would also constitute a violation of this CDP and of the LCP and/or Coastal Act. Accordingly, the Applicant remains subject to enforcement action just as it was prior to this permit approval for engaging in unpermitted development, unless and until the conditions of approval included in this permit are satisfied.

Failure to comply with the terms and conditions of this permit may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act. Only as conditioned is the proposed development consistent with the Coastal Act.

## **N. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

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

Monterey County, acting as lead agency, completed a mitigated Negative Declaration (MND) on October 29, 2003, for the previously-proposed Laube-Engel residential project on the site that concluded that, with the addition of mitigation measures, the project would not have significant environmental impacts. The County incorporated said mitigation measures into their approval of the project. The County did not prepare a new CEQA document for the Applicant's project. Staff construes the 2003 MND as constituting the proper CEQA documentation for this project for purposes of the Commission's responsibilities as a responsible agency. This conclusion is based on the following considerations: the current project is proposed under the same CDP application for which the 2003 MND was previously prepared; the currently proposed project is not a substantial change to the previously proposed project, nor are there substantial changes with respect to the circumstances under which the currently proposed project will be undertaken as

compared to the previously proposed project, that would involve new significant environmental effects or a substantial increase in the severity of previously identified significant effects; and there is no new information of substantial importance which was not known and could not have been known with the exercise of reasonable due diligence at the time the 2003 MND was adopted which has any significance under CEQA. Therefore, staff concludes that a subsequent MND did not need to be prepared under Section 15162 of the CEQA Guidelines.

The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. The preceding coastal development permit findings discuss the relevant coastal resource issues with the proposal, and the permit conditions identify appropriate modifications to avoid and/or lessen any potential for adverse impacts to said resources. All public comments received to date have been addressed in the findings above, which are incorporated herein in their entirety by reference.

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

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

- 1) Monterey County Local Coastal Program, Big Sur Area Land Use Plan (certified April 10, 1986) and Coastal Implementation Plan (certified December 10, 1987)
- 2) Monterey County file documents for PLN010105 (Laube and Engel)
- 3) Coastal Commission files for CDP Applications A-3-MCO-04-012 (Laube and Engel) and A-174-77 (Sorenson)
- 4) Coastal Commission files related to *McAllister v. Cal. Coastal Comm'n* (2008) 169 Cal.App.4<sup>th</sup> 912.
- 5) Ballerini, Fred, *Biological Assessment of Brandon Shui Ling Wang Property, Kasler Point, 36228 Highway 1, Big Sur, CA*, January 3, 2017.
- 6) Caprock Geology, Inc., *Geological Report, Kasler Point, 36228 Highway 1, Big Sur, California*, September 23, 2016.
- 7) State of California State Water Resources Control Board, Division of Water Rights, Order WR 2010 – 0028 – EXEC, In the Matter of Diversion and Use of Water by Garrapata Water Company, Order Approving Settlement Agreement and Cease and Desist Order, September 9, 2010.

## **APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS**

1. Applicant (Brandon Shui Ling Wang, c/o Rob Carver and Edward Lalonde)
2. Laube and Engel Appellant (Dr. Hugh McAllister, c/o John Bridges)
3. Monterey County Planning, Anna Quenga
4. State Water Resources Control Board, Matt Quint
5. Monterey County Environmental Health, Cheryl Sandoval
6. California American Water, Eric Sabolsice
7. Louise Ramirez, Ohlone Costanoan Esselen Nation