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# F6a

Appeal Filed: 2/25/2009  
49<sup>th</sup> Day: Waived  
Staff: Kevin Kahn - SC  
Staff Report: 6/23/2017  
Hearing Date: 7/14/2017

## APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION & DE NOVO HEARING

**Application Number:** A-3-MCO-09-009 (Rancho Los Robles Subdivision)

**Applicants:** Heritage/Western Communities LTD

**Appellants:** Commissioners Blank and Wan; and Friends, Artists and Neighbors of Elkhorn Slough

**Local Government:** Monterey County

**Local Decision:** Monterey County Coastal Development Permit Number PLN970159, approved by the Monterey County Board of Supervisors on December 9, 2008

**Project Location:** 100 Sill Road, Las Lomas, North Monterey County (APNs 412-073-002 and 412-073-015)

**Project Description for Substantial Issue Determination:** Subdivision of two parcels totaling 33.58 acres (one 16.96 acres and one 16.62 acres) into 76 lots; demolition of two single-family residences, two barns, and removal of two mobile home units; construction of 80 residences, including 68 single-family residences, four duplexes, and four apartments located above 17,000 square feet of commercial space; 9.7 acres of land to be used for future parks and recreation development and open space; construction of roads and related improvements.

**Project Description for  
De Novo Review**

Subdivision of two parcels totaling 33.58 acres (one 16.96 acres and one 16.62 acres) into 52 lots; demolition of one single-family residence, two barns, and removal of two mobile home units; construction of 54 residences, comprised of 50 single-family residences and four multi-family residences; dedication of 3.5 acres of land to Monterey County for future parks and recreational facilities; dedication of 17 acres of land and one existing single-family residence to a future to-be-formed Community Service District for future parks and recreational facilities; construction of roads and related improvements.

**Staff Recommendation:** Substantial Issue Exists; Denial

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**SUMMARY OF STAFF RECOMMENDATION**

Monterey County approved a coastal development permit (CDP) authorizing the subdivision of two parcels totaling 33.58 acres into 76 lots; as well as construction of 80 residences, comprised of 68 single-family residences, four duplexes, and a four-unit mixed-use structure to be located above 17,000 square feet of commercial space; 9.7 acres of land to be used for future parks and recreation development and open space; and private roads and related improvements in the unincorporated community of Las Lomas in North Monterey County. Las Lomas is a small, rural, mostly suburban residential community surrounded by North Monterey County's characteristic rolling hills consisting of open space, agriculture, and very low density residential development. The project site consists of sloping hills containing 16.5 acres of oak woodland habitat and 11 acres of strawberry row crop agricultural production. The residential lots would be located across most of the project site, and would range in size from 4,200 square feet to 18,000 square feet.

Two appeals were filed with the Commission, contending that the County-approved project is inconsistent with numerous Monterey County Local Coastal Program (LCP) standards, including those related to water supply and groundwater resources, traffic, wetlands, visual resources, and agricultural resources. Notably, the Appellants contend that the approved project cannot be served by an identifiable, available, and long-term water supply, including because the underlying groundwater basin from which the project is slated to receive water is already overdrafted and extracted at a level that exceeds its LCP-required safe yield amount. Therefore, a subdivision that will necessitate an additional permanent demand of water for 80 new residences and new commercial development from an already overdrafted groundwater source is both inconsistent with LCP policies that only authorize a level of development that can be served by the groundwater basin's safe yield amount, and with policies that dictate residential subdivision to be the lowest priority land use to receive water when supplies are scarce (coastal-dependent uses and agriculture being the highest priorities).

**Staff recommends that the Commission find that the appeals raise a substantial issue and that the Commission take jurisdiction over the CDP application. Staff further recommends that the Commission, on de novo review, deny the CDP.**

On de novo review, the Applicants have modified the proposed project. The revised proposal includes 54 residences (down from 80), with 50 single-family residences and four units in duplexes. Two of the single-family residences would be designated as Workforce Housing for households earning no more than 180% of median income, the four duplex units would be designated as affordable rental units pursuant to the County's affordable housing guidelines, and an affordable housing in-lieu fee would be paid to the County in lieu of developing additional affordable units on-site. The proposal for the eastern portion of the site, which previously contained additional residential lots and park facilities as approved by the County, has been modified to include additional land dedicated for future parks and recreational use. Specifically, the Applicant proposes to dedicate 3.5 acres of land to Monterey County for future public park and recreation improvements. Specific facility types would be identified in conjunction with Monterey County Parks Department and subject to separate CDP review and approval in the future. In addition, the Applicant proposes to dedicate roughly 17 acres of land to a to-be-formed Community Service District (CSD). Specific community facilities would be identified and built subject to the CSD securing funding and separate CDP approval in the future. Thus, the Applicant is proposing to dedicate over 20 acres of land to the County and to a to-be-created Community Service District for future parks, recreation, community facilities, and open space. This CDP application does not propose the *construction* of any of these facilities—it only proposes the land dedication. Finally, in the revised de novo proposal, the commercial space and entrance road along Hall Road have been eliminated.

North Monterey County has had severe groundwater overdraft problems for decades. Virtually all of the agricultural, commercial, and residential development in North Monterey County relies on groundwater pumped from local wells. The LCP requires development in North County to be served by an identifiable, adequate, long-term water supply, and only allows new development, particularly residential subdivisions, when the groundwater basin is in its safe yield extraction state (i.e., when the groundwater basin is not overdrafted). The proposed project would authorize a subdivision allowing for 54 residences and other development—essentially a brand new community—which would demand water from an already severely overdrafted groundwater basin. Thus, the project cannot be found to have a long-term and adequate water supply, and cannot be found to be served by water from a groundwater basin in a safe yield state, as the LCP requires. Even if, as the Applicant alleges, existing water use would be roughly equivalent to project water use (and thus wouldn't lead to *new* impacts), the LCP still does not allow for such development when groundwater is overdrafted, and even if it did include a 'no net increase in demand' criteria (which it does not), the vast majority of existing water use is for a Coastal Act and LCP priority agricultural use, and it is not LCP consistent to convert such high priority use to a proposed 54-unit residential subdivision in an area with known water supply deficiencies. In fact, when water deficiencies of the type currently present in this area apply, the LCP affirmatively *requires* the proposed development to be denied. Therefore, because the project proposes to convert existing high-priority agricultural uses and construct a low-priority 54-unit residential subdivision within a groundwater basin that is severely overdrafted, the proposed project is inconsistent with the LCP's water supply and priority land use policies, and must be denied.

Furthermore, the project proposes to create new lots and build a significant residential community, including roads, utilities, and potential future recreational uses, within oak woodland

habitat that is deemed ESHA pursuant to the LCP, and within prime/productive farmland (i.e., the western part of the site contains 16.5 acres of mature oak woodland habitat, while the eastern part currently supports 11 acres of strawberry row crops). Thus, the project proposes to convert nearly 28 acres of oak woodland and agricultural row crops to a 54-unit residential subdivision and related development, including associated grading, retaining walls, tree removal, and utilities. *The LCP does not allow these uses in ESHA nor on productive agricultural soils.* The project would also convert some of the area's scenic natural habitats and rural agricultural landscape into engineered, structural elements, inconsistent with LCP requirements to protect North County's scenic rolling hills, oak woodlands, and agricultural landscapes, while also impermissibly converting a wetland into a stormwater detention pond. For these reasons in addition to North County's groundwater/water supply limitations, the proposed project is inconsistent with the LCP, and must be denied.

Finally, the Commission has recently evaluated similar residential subdivision projects in North Monterey County, including Rancho Roberto (CDP application A-3-MCO-05-027) and Mayr (CDP application A-3-MCO-06-044). The Commission denied CDP applications for both of these projects in early 2017 due to their various LCP inconsistencies, including with respect to the lack of an available water supply and impermissible development within ESHA. While this project is similar to those in terms of basic concept (i.e., a residential subdivision) and LCP conformance issues (e.g., water supply, land use prioritization, ESHA protection), the currently-proposed project would have LCP-impermissible coastal resource impacts of a much more significant magnitude than the other similar proposals which were denied by the Commission (the proposed project is almost twice the size in terms of number of proposed residences as those other two projects *combined*).

However, unlike those previous projects which were solely residential, this project also includes the dedication of land for potential to-be-identified public amenities to be built in the future, including through the formation of a new CSD special district to build, own, operate, and maintain such facilities. The County found in its certification of the project's Environmental Impact Report (EIR) that these recreational amenities outweighed the project's significant and unavoidable environmental impacts<sup>1</sup>. However, while staff clearly recognizes the potential public benefit such additional park and recreation land could provide, particularly to a community like Las Lomas that is in need of such amenities, as described throughout this report, the project site includes numerous LCP fatal flaw constraints, from oak woodland ESHA to prime/productive agricultural soils to being located in a predominantly rural area with insufficient transportation infrastructure, that simply preclude the ability build such a large residential subdivision project and other proposed development. And most fundamentally, the LCP does not allow residential subdivisions, particularly one that will convert an existing agricultural operation and ESHA, when the groundwater basin from which water supply will be provided is overdrafted beyond its safe yield level, as is the case here in North Monterey County. These were the same identified constraints that necessitated denial of the Rancho Roberto and Mayr residential subdivision projects, and are the same fundamental inconsistencies that require denial in this project as well. Thus, while this project's potential site amenities could be beneficial to the broader community should they be funded and built at some point in the future,

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<sup>1</sup> And the County certified the EIR pursuant to a Statement of Overriding Consideration. It should be noted that the Monterey County LCP does not include any type of 'override' provision similar to CEQA, and development must be consistent with the LCP in all cases.

they cannot be used as justification to find consistency of the larger proposed project here with the LCP.

Finally, staff wants to make clear that it completely understands the desire and need for additional community amenities in the Las Lomas area, including additional parks, active recreation areas, and other facilities (e.g., libraries, community centers, etc.). There is no doubt that the Las Lomas community is lacking in and deserves improvements of this type, and staff is fully supportive of their pursuing such amenities. It is just that in this case and in this project, LCP tests simply cannot be met, even if a component of the project could lead to some of these types of 'goods' for the community. That is not to say that there aren't potential projects focused on such community facilities that couldn't meet LCP tests, because in staff's view there are (e.g., potential improvements at existing public facilities (such as at nearby Hall District Elementary School) to provide expanded access and utility to the broader community). And staff is fully supportive of the County and the community pursuing such projects, and remains committed to continued collaboration toward that end. This project, however, has fatal LCP flaws and is not the appropriate vehicle to realize such community goals. Rather, staff looks forward to helping the community to reach its goals in an LCP consistent way, and stands ready to provide LCP guidance and support towards that end moving forward.

In short, the project proposes a very large suburban-style residential subdivision in a predominantly rural, agricultural area with severe water supply deficiencies, and on land currently comprised of ESHA and bona fide agricultural production. Thus, staff recommends that the Commission deny a CDP for the proposed residential subdivision project. The motions are found on page 7 below.

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### EXHIBITS

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Exhibit 2 – Site Photos

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Exhibit 4 – County’s Final Local Action Notice

Exhibit 5 – Appeal Contentions

Exhibit 6 – North Monterey County Groundwater Sub-basins and Overdraft Amounts

Exhibit 7 – Applicants’ Proposed Site Plan and Lot Configuration

Exhibit 8 – Applicants’ Correspondence/Estimated Project Water Usage

Exhibit 9 – Ex Parte Correspondence

Exhibit 10 – Post-Appeal Correspondence

Exhibit 11 – Monterey County LCP Amendment No. 1-85 Staff Report

Exhibit 12 – Department of Water Resources’ Critically Overdrafted Groundwater Basins

Exhibit 13 – Comment Letters from Commission Staff to Monterey County

Exhibit 14 – EIR Oak Woodland Habitat Map

Exhibit 15 – NRCS Land Capability Classification Soils Map

## I. MOTIONS AND RESOLUTIONS

### A. Substantial Issue Determination

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo hearing and action. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in a de novo hearing on the CDP application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-MCO-09-009 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and I recommend a no vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-MCO-09-009 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Monterey County Local Coastal Program.*

### B. CDP Determination

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

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-MCO-09-009 for the development proposed by the applicant, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-MCO-09-009 on the grounds that the development will not be in conformity with the Monterey County Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

## II. DECLARATIONS

The Commission finds and declares as follows:

### A. PROJECT LOCATION

The County-approved project is located on two parcels (totaling 33.58 acres) at 100 Sill Road on the eastern edge of the unincorporated community of Las Lomas in North Monterey County. Las Lomas is a small, rural, predominantly residential community surrounded by North Monterey

County's characteristic rolling hills consisting of open space covered by grasslands, maritime chaparral, and oak forest habitat; agricultural uses, including for both grazing and row crops; and very low density residential development. The project site generally is located along the eastern border of the urbanized portion of this rural community, and is surrounded to the northwest and southwest by low-density residential development, and to the northeast and southeast by open space and agricultural row crops. The western side of the project site is undeveloped, consisting of 16.5 acres of oak woodland, while roughly 11 acres along the eastern side of the site consists of strawberry row crops and other agricultural development. Hall Road forms the project site's southern boundary, while Sill Road forms the northern boundary. The northern portion along Sill Road is mostly flat at an elevation of roughly 72 feet above sea level, and then slopes down some 60 feet in elevation to an elevation of roughly 12 feet above sea level along Hall Road. The project site contains two single-family residences and two mobile homes. The property is mostly zoned Medium Density Residential (MDR), which allows for a potential maximum residential density of up to four units per acre if constraints are not present that dictate a lower density. A portion of the southeast corner of the project site is zoned Coastal General Commercial (CGC), which allows for a broad range of commercial uses.

See **Exhibit 1** for a project location map and **Exhibit 2** for aerial photos of the project site.

## **B. PROJECT DESCRIPTION**

The County-approved project consists of the subdivision of the site's two parcels (totaling 33.58 acres) into 76 parcels ranging in size from 4,200 square feet to 18,000 square feet; demolition of the two existing single-family residences, two barns, and removal of the two mobile home units; construction of 80 residential units, comprised of 68 single-family residences, four duplexes, and four apartment units located above a 17,000-square-foot commercial structure on a 1.76-acre mixed-use parcel; and creation of a 9.7-acre common area parcel to be used for future parks and recreation development and open space. The County-approved project also includes construction of an interior private road network, the construction of an additional turn lane on Hall Road to access the site, construction of a stormwater detention pond within a wetland area along Hall Road, and related improvements. The approved development would occupy much of the project site, with most of the single-family residences located within the oak woodland on the western portion of the site (the County's approval authorizes the removal of up to 25 coast live oak trees), and the common area parcel and commercial space located along the eastern portion of the site, which is currently used for strawberry production (see **Exhibit 3** for the County-approved project plans). Water would be provided by the California Water Service Company via off-site existing wells.

## **C. MONTEREY COUNTY APPROVAL AND APPEAL HISTORY**

On October 29, 2008, the Monterey County Planning Commission *denied* the proposed project based on LCP inconsistencies with respect to lack of water and traffic congestion, including finding that the project's benefits did not outweigh its environmental effects. The Planning Commission's decision was appealed to the Board of Supervisors, who reversed the Planning Commission denial and approved a CDP for the project on December 9, 2008. Notice of the Board's action on the CDP was received in the Coastal Commission's Central Coast District Office on February 9, 2009 (see **Exhibit 4**). The Coastal Commission's ten working-day appeal



period for this action began on February 10, 2009 and concluded at 5 p.m. on February 25, 2009. Two valid appeals were received during the appeal period. See **Exhibit 5** for the full text of the appeals.

Prior to and at the time the appeal was filed, the County was processing other similar North County residential subdivision projects. Thus, Commission staff concluded it would be prudent to work with the County on the subdivision projects moving through the local process, with the goal of coming to resolution with County staff on how the LCP's provisions relate to the residential development potential in North County given common factual circumstances (in order to reach an understanding as to interpretation of core LCP policies so as to avoid unnecessary appeals, if possible). Commission staff reviewed and commented on all of these projects, including the current project on appeal as it went through the local process (see Commission staff comments to the County and Applicant in **Exhibit 13**, where Commission staff identified numerous concerns with the County's interpretations on various LCP policies and the assumptions being made with respect to available water supplies, as well as the LCP inconsistencies this project engendered with respect to agricultural, visual, and biological resources and traffic). Additionally, at that time numerous water supply projects and programs were either being proposed or were under construction that could have potentially affected North Monterey County's water resources and groundwater supply. Therefore, Commission staff felt it necessary to understand the viability and efficacy of the various water supply projects as they would relate to the project currently on appeal, and whether those projects would abate the area's ongoing and long-term groundwater overdraft.

While undertaking this outreach with the County and monitoring North Monterey County's water situation, and after informing the Applicants of the LCP inconsistencies the County-approved project engendered, staff did not hear from the Applicants about whether they still intended to move forward with the project following the appeals in 2009 (see 2011 staff letter to the Applicants in **Exhibit 10**, where staff also identified that, if the Applicants still wanted to pursue the project, staff would be recommending that a substantial issue with the County's approval exists and that the Commission deny a CDP for the project on de novo review based on LCP inconsistencies with respect to water supply, groundwater resources, agricultural resources, visual resources, ESHA, and traffic). In 2015, the Applicants indicated that they were still interested in pursuing the project, and that, in an attempt to address the project's potential coastal resource impacts, had revised their project from the one approved by the County (see the revised project description in the de novo review section beginning on page 19). Since then, staff subsequently met with the Applicants and/or their representatives on several occasions to discuss project issues and all parties agreed that the Commission's July 2017 hearing in the Central Coast would be an appropriate time and venue to hear the project before the Commission.

#### **D. APPEAL PROCEDURES**

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream,

or within 300 feet of the top of the seaward face of any coastal bluff, or (3) in a sensitive coastal resource area; or (4) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. The County's approval of this project is appealable because the proposed development is located within 100 feet of a wetland (the wetland at the property's southern boundary) and because the subdivision is not a principal permitted use under the LCP.

The grounds for appeal under Section 30603(b)(1) are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to conduct the de novo portion of the hearing on an appealed project unless a majority of the Commissioners present finds that "no substantial issue" is raised by such allegations. Under Section 30604(b), if the Commission considers the CDP de novo and ultimately approves a CDP for a project, the Commission must find that the proposed development is in conformity with the certified LCP.

The only persons qualified to testify before the Commission on the substantial issue question are the Applicants (or their representatives), persons opposed to the project who made their views known before the local government (or their representatives), and the local government (pursuant to Title 14 Section 13117 of the California Code of Regulations (CCR)). Testimony from other persons regarding substantial issue must be submitted in writing (again, per CCR Section 13177). Any person may testify during the de novo CDP determination stage of an appeal.

## **E. SUMMARY OF APPEAL CONTENTIONS**

The Appellants contend that the County-approved project is inconsistent with numerous Monterey County LCP groundwater resources and water supply policies, including those that require an identifiable, available, and long-term water supply (Land Use Plan (LUP) Policy 2.5.1); require development to be phased so that water supplies are not committed beyond their safe yield and, if the safe yield is already exceeded, only allow new development to proceed once additional water supplies are secured to bring the basin into its safe yield state (LUP Policy 2.5.2.3); require development to be limited to an amount that can be supported by the safe yield level of the underlying groundwater basin (LUP Policy 2.5.3.A.2); and require that where there is limited water supply to support development, coastal-dependent uses (i.e., coastal-dependent agriculture, recreation, commercial, and industrial uses) shall have priority over residential and other non-coastal-dependent uses (LUP Policies 2.5.3.A.1 and 4.3.5.4). Furthermore, the Appellants contend that the assumptions made in the County's findings are inadequate, including that the County only used 20 years as a standard to define "long-term water supply," which is not supported by the LCP, and that the County also calculated there to be 162 years of water supply based on how long it would take to extract all of the water within the basin at the existing water extraction level, which is precisely the scenario the LCP's policies and standards are meant to prevent through the safe-yield concept, including by ensuring that groundwater resources and the development it supports are not adversely impaired.

Finally, the Appellants contend that the County's approval raises LCP consistency questions related to a variety of other issues, including with respect to visual resources, including that the

project would impermissibly site development on ridgelines and adversely affect the area's rural character; wetlands and environmentally sensitive habitat areas (ESHA), including because it would authorize development within and adjacent to an LCP-protected wetland; traffic, including because the project's Environmental Impact Report (EIR) concluded that the project would have a significant and unavoidable impact on local and regional traffic congestion; and agricultural conversion, including that the project would convert 11 acres of existing agricultural productive uses to residential development.

See **Exhibit 5** for the Appellants' contentions. See Section H below for the text of the above-cited LUP policies.

## **F. SUBSTANTIAL ISSUE DETERMINATION**

The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (CCR Section 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors in making such determinations: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP (and with the public access policies of the Coastal Act if applicable); (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. Even where the Commission chooses not to hear an appeal, Appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

In this case, for the reasons discussed further below, the Commission determines that the County's approval of a CDP for the project presents a substantial issue.

### **1. Water Supply**

#### *Applicable LCP Policies*

The Monterey County LCP is divided into four segments, each with its own LUP<sup>2</sup> and Implementation Plan (IP). The subject property is located within the North County LCP segment. The North County LCP includes an extensive policy framework meant to protect the area's rich coastal resources, including through policies that protect groundwater, require an adequate water supply to serve new development, protect and prioritize agriculture, and direct development to existing developed areas best able to accommodate it.

Specifically, the LCP includes policies that require all new development to be served by an identifiable, available, and long-term water supply (LUP Policy 2.5.1), specifically requires new subdivisions dependent on groundwater to have an adequate, long-term water supply (LUP Policy 4.3.5.7), and only authorize an amount of development that can be served by the safe yield groundwater extraction level (LUP Policies 2.5.2.3 and 2.5.3.A.2). The LCP defines "safe yield" as the amount of extraction that the resource can produce over the long-term without

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<sup>2</sup> The County's four LUP and IP areas are: North County, Del Monte Forest, Carmel Area, and Big Sur.

impairment of the resource and other associated resources (North County IP Section 20.144.020.VVVV). The LCP does not contain a specific numeric safe yield amount for each groundwater basin, but instead requires definitive water studies, hydrologic reports, and the most updated resource information to determine appropriate safe yields and the amount of new development such a yield can support (LUP Policy 2.5.3.A.2 and IP Section 20.144.070.E.11).

Consistent with the above-discussed policies, the LUP also requires development to be phased so that water supplies are not committed beyond their safe yield and, if the safe yield is already exceeded, only allows additional development to proceed once additional water supplies are secured that will bring the basin back into LCP-required safe yield state (LUP Policy 2.5.2.3). The LUP further requires that where there is limited water supply to support development, coastal-dependent uses (such as coastal-dependent agriculture, recreation, commercial, and industrial uses) shall have priority over residential and other non-coastal-dependent uses (LUP Policy 4.3.5.4). Finally, LUP Policy 4.3.5.7 requires new subdivisions and development dependent upon groundwater to be limited and phased over time until an adequate supply of water to meet long-term needs can be assured. Should the resource information find that the underlying groundwater basin is being extracted in a manner exceeding its safe, long-term yield, then the LCP affirmatively requires denial of a proposed project, particularly low-LCP priority residential subdivisions, unless and until additional water supplies are secured and the safe yield level is reached (IP Sections 20.144.070.E.11, 20.144.140.A.1, and Policy 2.5.2.3).

Overall, these policies and IP sections (see Section H below for full text) are meant to implement applicable Coastal Act policies that require new development to be served by adequate public services (Section 30250(a)), in a manner that does not impact groundwater and other coastal resources (Sections 30231 and 30250(a)), and by prioritizing certain land uses, such as agriculture, over others, such as residential subdivision (Coastal Act Section 30222).

#### *Appellants' Contentions*

The Appellants contend the County-approved project is inconsistent with these aforementioned LCP groundwater resources and water supply policies and IP sections. Specifically, they contend that the approved project cannot be served by an identifiable, available, and long-term water supply, including because the underlying groundwater basin from which the project will receive water is already overdrafted and extracted at a level that exceeds its safe yield amount.

Therefore, a subdivision that will necessitate an additional permanent demand of water for 80 new residences and commercial development from an already overdrafted groundwater source is both inconsistent with LCP provisions that only authorize a level of development that can be served by the groundwater basin's safe yield amount, and with provisions that dictate residential subdivision to be the lowest priority land use to receive water when supplies are scarce (with coastal-dependent uses and agriculture being the highest LCP land use priority). Furthermore, the Appellants contend that the assumptions made in the County's findings are inadequate, including that the County only used 20 years as a standard to define "long-term water supply," which is not supported by the LCP, and that the County also calculated there to be 162 years of water supply based on how long it would take to extract *all* of the water within the basin at the existing water extraction level, which is precisely the scenario the LCP's policies and standards are meant to prevent through the safe-yield concept, including by ensuring that groundwater resources and the development it supports are not adversely impaired.

### *Analysis*

The subject site is located in North Monterey County, which has severe groundwater overdraft problems. Virtually all of the agricultural, commercial, and residential development in North Monterey County relies on groundwater pumped from local wells, with agriculture accounting for approximately 85 percent of the water demand. The North County LCP area is divided into two groundwater basins: the Salinas River Groundwater Basin and the Pajaro Valley Groundwater Basin. Within these two basins are five sub-basins, two of which are part of the Salinas River Basin: Highlands South and Granite Ridge; and three of which are part of the Pajaro Valley Basin: Springfield Terrace, Highlands North, and Pajaro. The approved project is located within and would receive water supply from groundwater sources within the Highlands North sub-basin of the Pajaro Valley Groundwater Basin (see **Exhibit 6** for a location map of the area's groundwater basin geography).

As previously described, keeping groundwater usage within the basins' safe yield extraction level is a key LCP requirement. The LCP does not include a numeric safe yield amount for each groundwater basin, but instead requires that safe yield be understood based on definitive water studies, hydrologic reports, and new information sources (LUP Policy 2.5.3.A.2 and IP Section 20.144.070.E.11). Since the time that the LCP was certified, the County has sponsored studies to determine the safe yield levels of groundwater extraction in the North County basins. The first study commissioned by the County was conducted in 1995<sup>3</sup> and calculated the groundwater overdraft for North County's five groundwater sub-basins on the order of 11,700 acre-feet per year (AFY),<sup>4</sup> based off a defined sustainable groundwater withdrawal yield<sup>5</sup> of 14,410 AFY and an actual extraction level of 26,110 AFY. The study also calculated the overdraft of the Highlands North sub-basin at 1,860 AFY. Subsequently, the 2002 *North Monterey County Comprehensive Water Resources Management Plan* (CWRMP)<sup>6</sup> updated the 1995 analysis and calculated the 5 sub-basin overdraft to be as much as 16,340 AFY due to an increase in estimated water usage (see **Exhibit 6**).<sup>7</sup> The CWRMP calculated the Highlands North sub-basin's overdraft at 2,701 AFY (greater than the 1,860 AFY overdraft calculated in 1995), and documented significant seawater intrusion problems affecting the area's water quality, including the failure of numerous wells. Finally, in 2014, the Pajaro Valley Water Management Agency updated its *Basin Management Plan*, which applies to the Pajaro Valley groundwater basin, and estimated the basin's overdraft at 12,100 AFY.<sup>8 9</sup>

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<sup>3</sup> Fugro West, Inc., 1995. *North Monterey County Hydrogeologic Study, Vol. 1: Water Resources*. Prepared for Monterey County Water Resources Agency, October 1995.

<sup>4</sup> Id. Table 11, page 77. An acre-foot is equivalent to 326,700 gallons of water.

<sup>5</sup> The *North Monterey County Hydrogeologic Study* defines "sustainable yield" as "the amount of annual pumping not causing additional groundwater declines from 1992 conditions and/or not causing additional seawater intrusion." Page 77.

<sup>6</sup> Monterey County Water Resources Agency and EDAW, Inc., 2002. *North Monterey County Comprehensive Water Resources Management Plan*, January 2002.

<sup>7</sup> Id. Table 1, Pages 2-7. The 2002 *Comprehensive Water Resources Management Plan* identified the same sustainable yield of about 14,410 AFY as the 1995 Fugro West study, but estimated extraction at 30,750 AFY, resulting in an overdraft in North Monterey County of 16,340 AFY.

<sup>8</sup> Based on a safe yield of roughly 48,000 AFY and a withdrawal of roughly 61,000 AFY.

Thus, all three sources, which constitute the best available information regarding overdraft in the North County LUP area, conclude that North County's groundwater basins, including the sub-basin where the approved project is located and where it is to receive its potable water supply (Highlands North), are overdrafted and currently supplying water to existing land uses at an amount exceeding the aquifers' safe yields. In contrast, the County approved the project based on a 305.2 gallons per household per day water usage limit, finding that the subdivision would be served by an identifiable, available, and long-term water supply using a 20-year threshold for determining "long-term," and further finding that the Highlands North sub-basin will provide an available water supply for 162 total years, at which time the sub-basin will be entirely depleted.

The County-approved project authorizes a residential subdivision that would result in 80 new residences and commercial development, utilizing water from groundwater aquifers that are already being pumped beyond their safe yield level. Therefore, the County's approval is inconsistent with LUP Policy 2.5.2.3 because the approval commits to new development an amount of water in exceedance of the groundwater basin's safe yield level. Furthermore, when existing development generates water demand in exceedance of the safe yield level, which is the case in North County, this policy only allows additional development when additional water supplies are secured to bring the basin into its safe yield state. In essence, the policy stands for the premise that the amount of allowed development must be commensurate with the amount that the groundwater basin's safe yield can accommodate. The groundwater basin is already overdrafted, meaning that the demand generated from existing development is already greater than the available water supply, and thus without "additional water supplies" that would erase this imbalance, new residential subdivisions which are a low-priority LCP use cannot be allowed. Although some have articulated as much, it is not enough under the LCP to have a 'no net increase' in water demand as that does not bring the basin into balance before allowing new development, as is required by the LCP. The County's approval is also inconsistent with Policy 2.5.3.A.2, which similarly limits groundwater use to its safe yield level, and only authorizes an amount of development commensurate with what the underlying groundwater basin's safe yield can support. The groundwater basin is not at a safe yield level, and cannot even support *existing* development in this area without overdraft. Thus, the County-approved project raises substantial LCP conformance issues with respect to groundwater extraction levels and the amount of development such extraction can support.

With respect to Policy 2.5.1, which requires development to be served by an identifiable, available, and long-term water supply, the County used a 20-year period to define long-term water supply, making reference to State laws SB610 and SB221, which require new large residential developments to provide proof of an available water supply for at least 20 years. Furthermore, the County found that there would be an adequate water supply for 162 years, based on the total amount of stored groundwater in the Highlands North sub-basin of 912,247 AF, and an annual average usage of 5,612 AF. However, there are numerous LCP

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<sup>9</sup> The *Basin Management Plan* quantified the overdraft condition of the entire Pajaro Valley Groundwater Basin, which extends into Santa Cruz County. The *North Monterey County Hydrogeologic Study* and the *North Monterey County Comprehensive Water Resources Management Plan*, the two previous studies on groundwater overdraft, quantified overdraft solely within the portions of the two groundwater basins (Salinas River and Pajaro Valley) located within the North County LCP area. Thus, the three reports share different geographic scopes resulting in large absolute calculations for the 2014 Basin Management Plan as compared to the 1995 Fugro West Study and the 2002 CWRMP, but all quantify significant overdraft within the project area.

inconsistencies with the County's reasoning and analysis leading to the County's conclusion that the development will be served by an identifiable, available long-term water supply.

First, using a 20-year standard from SB610 and SB 221 as the threshold for determining whether a residential subdivision consisting of 80 new residences and commercial development can be served "long-term" by a resource as fundamental as water sets a potentially dangerous precedent for establishing whether adequate long-term public services exist because neither SB610 nor SB221 are incorporated into the LCP in any way as applicable standards, and such an approach is unsupported by past LCP interpretation. As will be explained below, considering that the entire Northern Monterey County Groundwater Basin (including the Pajaro Valley Groundwater Basin and the Highlands North sub-basin) are all in a state of overdraft, this necessarily means that no "long-term" water supply currently exists to support the proposed subdivision. Furthermore, the County's 162-year "available" water supply finding is based on *completely draining* the entire groundwater aquifer, which directly contradicts the LCP's "safe yield" definition (and the concept of safe/long-term yield in general) and the policies that seek to maintain groundwater basins in their safe yield state. Specifically, North County IP Section 20.144.020.VVVV defines "safe yield/sustained yield" or "long term sustained yield" as "the yield that a renewable resource can produce continuously over the long-term at a given intensity of management *without impairment of the resource* and other associated resources" (emphasis added), and many of the aforementioned LUP policies limit development to protect groundwater supplies at a "safe/long-term yield" (e.g., LUP Policies 2.5.1, 2.5.2.3, 2.5.3.A.2, and 4.3.5.7).

In essence, the LCP's policies are intended to guard against the precise action taken by the County in that they limit groundwater usage to its safe yield level for the protection of public health, safety, and coastal resources by ensuring that water supplies are not committed to a level that will result in the complete exhaustion of water resources and leave existing development without basic public services. As previously described, the County's approval would commit water from an already overdrafted groundwater basin for 80 new residences and commercial development. The groundwater basin's overdraft status establishes that, in its current state, the basin cannot supply water over the long term in a manner that would not impair the basin and the resources that depend on it, and thus a project that would exacerbate that overdraft cannot be found to have a long-term water supply. These findings are articulated in the project's EIR, which found that "the proposed project would result in significant and unavoidable cumulative groundwater impacts."<sup>10</sup> Therefore, the County's approval is inconsistent with LUP Policy 2.5.1's overarching requirement that development be served by a long-term water supply, and is also inconsistent with LUP Policy 4.3.5.7, which only allows new subdivisions when they too can be supplied by an adequate, long-term groundwater source. The County-approved project therefore raises substantial LCP conformance issues in this regard.

Finally, in its findings for approval, the County cited an old LUP policy as a significant factor. However, the cited policy, LUP Policy 4.3.6.D.6, is not a part of the certified LCP. Old LUP

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<sup>10</sup> Rancho Los Robles Subdivision Final Environmental Impact Report, State Clearinghouse Number 2002091010 (the "Rancho Los Robles Subdivision EIR"), page 3-12. The County certified the project's EIR, however, pursuant to a Statement of Overriding Consideration, finding that the benefits of the project, including the provision of affordable housing and parks and open space, outweighed the project's significant and unavoidable impacts on regional groundwater and seawater intrusion, as well as traffic congestion on Highway 1.

Policy 4.3.6.D.6 formerly designated the project site High Density Residential and as a Special Treatment Area specifically programmed for residential development, as follows:

*An area of high density residential development is planned at Las Lomas between Hall and Sill roads in order to encourage the provision of low and moderate income housing consistent with the Las Lomas Development Incentive Zone of the Monterey County Housing Element. The area designated for High Density Residential development contains approximately 44 acres and may, consistent with the availability of public services and other resource considerations, be developed at a gross density of 7 to 7.5 dwellings per acre, or a total of about 320 units. The Special Treatment Area designation is applied in order to encourage planned development that will ensure retention of the site's natural amenities, particularly its mature oaks and also to provide for community needs such as a meeting hall or recreation area, and convenience shopping.*

However, this entire policy was deleted from the LCP in 1986 in LCP Amendment No. 1-85<sup>11</sup>. This LCP amendment also changed the land use designation from High Density Residential to Medium Density Residential and deleted the Special Treatment Area designation, all due to public service capacity constraints that limited the intense residential development previously envisioned (see the Commission-adopted staff report for this LCP amendment in **Exhibit 11**). Thus, the County's reliance on this policy as justification for its approval is inherently inconsistent with the LCP, including because the policy is no longer part of the LCP, and the reason the County submitted the amendment to the Commission to delete the policy and amend the land use designations (i.e., inadequate public services) is still extant today for all of the reasons articulated above.

In sum, the LCP requires development in North County to be served by a long-term water supply and only allows new development, particularly residential subdivisions, when the groundwater basin is in its safe yield extraction state. The County's approval authorizes a subdivision allowing for 80 future residences and commercial development, which will demand water from an already severely overdrafted groundwater basin. The project cannot be found to have a long-term water supply, and cannot be found to be served by water from a groundwater basin in its safe yield state, and thus is inconsistent with LCP policies in this regard. The County's approval raises a substantial LCP conformance issue with respect to groundwater resources and water supply.

## **2. Other LCP Conformity Contentions**

As described earlier, the Appellants also identify a series of other LCP conformance issues with the County's approval, including with respect to wetlands protection, traffic, visual resources, and agricultural preservation. First, with respect to wetlands, the project would convert the existing wetland near Hall Road into an engineered stormwater detention basin. However, LUP Policy 2.4.3.6 (vis-a-vis incorporation of Coastal Act Section 30233(a)) only allows limited uses within wetlands, including restoration projects and incidental public service projects. The detention pond's purpose is to capture and treat the increased stormwater generated from the adjacent new residential and commercial development that the subdivision would ultimately

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<sup>11</sup> Approved by the Commission on March 26, 1986.



provide for. Thus, the conversion of the wetland to a private stormwater detention pond is not an LCP-allowed use.

With respect to traffic, the LCP requires new development to be located in areas with sufficient road capacity (LUP Policy 3.1.2.6), specifies non-coastal-dependent development, such as residential subdivision, to be a low priority for use of existing road capacity (LUP Policy 3.1.3.1), and specifies a Level of Service “C” as the identified maximum traffic capacity for Hall Road (LUP Policy 3.1.3.2). The project would introduce 80 new residences, commercial development, and their associated traffic to an area served by two-lane rural roads. As such, the EIR found that the project would have a significant and unavoidable impact on local and regional traffic capacity, including because intersections along Hall Road in the immediate project vicinity already operate at LOS F at peak travel periods. The project thus introduces significant new development in a rural area with inadequate transportation infrastructure even though residential subdivision is designated a low priority for use of existing road capacity, and thus raises questions about its LCP conformity in this regard.

With respect to visual resources, the LCP requires the protection of North County’s rural character, including by only allowing low-intensity development along slopes and ridgelines (LUP Policy 2.2.1), requires new lots created by subdivisions to be screened from public view and minimize tree removal and grading (LUP Policy 2.2.2.3), and requires protection of agricultural uses as a visual resource (LUP Policy 2.2.2.6). The approved project converts nearly 28 acres of oak woodland and agricultural row crops to an 80-unit residential and commercial subdivision, along with associated grading, retaining walls, tree removal, and utilities, that is highly visible from Hall Road and other public view points. The project introduces hard lines and large-scale suburban-style residential development in a rural, agricultural area, and would thus significantly alter the area’s character. The approved project thus raises LCP conformity questions pertaining to visual resources.

Finally, the County-approved project converts approximately 11 acres of existing strawberry fields into residential, commercial, and recreational development. The LCP requires prime and productive agricultural soils to be protected (LUP Policy 4.3.5.1), and protects agricultural uses for their scenic and visual qualities (LUP Policy 2.2.2.6). The project thus raises significant questions about its LCP conformity with respect to agriculture as well.

### **3. The Five “Substantial Issue” Factors**

As explained above, the Commission in the past has been guided in its decision of whether the issues raised in a given appeal case are “substantial” by the following five factors: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

In this case, these five factors, considered together, support a conclusion that this project does raise a substantial issue of LCP conformance. Perhaps most importantly for making the substantial issue determination in this case, regarding the first factor, the County found the development consistent with applicable LCP water supply and groundwater resources policies

based on a 20-year water supply and assumptions that the entire groundwater basin would be depleted in 162 years, which assumptions are not supported by nor consistent with LCP policies that seek to preserve groundwater basins at their safe yield extraction level. In addition, the County's approval partly relied on a policy that had been deleted from the LCP in 1986 and on land use designations that had been previously amended or deleted from the LCP. Thus, the County's methodological approach has no basis in the LCP, meaning that the County has not provided adequate factual or legal support for its decision to allow this residential subdivision in an area of known severe groundwater overdraft. By contrast, the LCP uses a "safe yield" standard for evaluating project impacts on water supply/use and the best available information clearly establishes that water in the relevant sub-basin is in exceedance of the safe yield (overdraft). Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of Substantial Issue because the subdivision would result in 76 new parcels with the purpose of allowing for 80 residential units and commercial development on those parcels. Considering that the development is situated on a rural lot of oak woodland and agricultural development, and that such development would require dedicated water supplies for 80 residences and 17,000 square feet of commercial development in an area of known significant groundwater overdraft, the extent and scope of the proposed development is significant.

Regarding the third factor, the approved project is located in an area where the depletion of groundwater adversely affects significant coastal resources, such as agriculture, including through lack of water supply and through seawater intrusion. This factor supports a finding of Substantial Issue. Regarding the fourth factor, because the project raises such coastal resource protection concerns, including interpreting the LCP to allow for residential subdivisions (a low priority LCP use) in areas with severe groundwater overdraft conditions and on lots supporting existing bona fide agricultural production uses (a high priority LCP use), a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP particularly relating to interpretation of the water supply/use policies and corresponding "safe yield" standards of the LCP.

Finally, regarding the fifth factor, the project raises issues of regional or statewide significance due to the importance of groundwater resources in Northern Monterey County, and growth and development issues in rural, agricultural North County more broadly. In short, the County-approved project does not adequately address LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue.

#### **4. Substantial Issue Determination Conclusion**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, which will determine whether the Commission should assert jurisdiction over a de novo CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance, including when evaluated in light of the five factors discussed above.

For the reasons stated above, the Commission finds that Appeal Number A-3-MCO-09-009 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603(b)(1) of the Coastal Act, and therefore the Commission finds that a substantial issue exists with respect to the County-approved project's conformance with the certified

Monterey County LCP, and takes de novo jurisdiction over the CDP application for the proposed project.

## **G. COASTAL DEVELOPMENT PERMIT DETERMINATION**

The standard of review for this CDP determination is the Monterey County certified LCP. All Substantial Issue Determination findings above are incorporated herein by reference.

### *Revised Project Description*

On de novo review, the Applicants have modified the proposed project (see **Exhibit 7** for the proposed site plan). Specifically, the new revised proposal includes 50 single-family residences and four units in duplexes in the northern and western portions of the project site (down from 80 residences). As now proposed, two of the single-family residences would be reserved as Workforce Housing for families earning up to 180% of Monterey County median income, and the four duplex units would be designated as affordable rental homes pursuant the County's affordable housing guidelines (i.e., restrictions on income levels and allowable rent<sup>12</sup>). Finally, the Applicant proposes to pay an affordable housing in-lieu fee to the County as opposed to developing additional affordable units on site to satisfy remaining affordable housing requirements.

In addition, the Applicant proposes to dedicate 3.5 acres of land to Monterey County for future public park and recreation improvements. Specific facility types would be identified in conjunction with Monterey County Parks Department and subject to separate CDP review and approval in the future. In addition, the Applicant proposes to dedicate roughly 17 acres of land to a to-be-formed Community Service District (CSD). Specific community facilities would be identified and built subject to the CSD securing funding and separate CDP approval in the future. Thus, the Applicant is proposing to dedicate over 20 acres of land to the County and to a to-be-created Community Service District for future parks, recreation, community facilities, and open space. This CDP application does not propose the *construction* of any of these facilities—it only proposes the land dedication. Finally, in the revised de novo proposal, the commercial space and entrance road along Hall Road have been eliminated.

### *North Monterey County Background*

North Monterey County is a predominantly rural area with significant coastal resources, including open space occupied by grasslands, maritime chaparral, and oak woodland habitats, and significant agricultural operations, including for both grazing and row crops, all surrounding the Elkhorn Slough estuarine complex, a federal reserve and one of the largest and most important coastal wetlands and estuaries remaining in California. Because of the area's rich coastal resources, longstanding public policy, including as codified in the LCP, has been to retain North Monterey County as a rural, open space and agricultural buffer along the mid-Monterey Bay area, in between more urban areas of Santa Cruz County to the north and the Monterey

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<sup>12</sup> Chapter 18.40 of the Monterey County Code addresses inclusionary housing requirements, including that a specified number of new residential units be affordable for very low, low, and moderate income households. Chapter 18.40, and thus the affordable housing requirements specified in it, are NOT part of the certified LCP and cannot be used as a standard of review for this CDP application. However, since the County has indicated that the proposed project must meet Chapter 18.40's affordable housing requirements, the Applicant has included these requirements as part of the project description.

Peninsula to the south. In other words, one of the region's land use planning goals has historically been to direct more urban development to existing urban centers along the north and south ends of the Monterey Bay, and not to sprawl within the ecologically and agriculturally productive North County area. This broad goal was articulated in the findings of the 1975 California Coastal Plan (Coastal Plan), prepared for the Governor and Legislature by the California Coastal Zone Conservation Commission per the requirements of the 1972 Proposition 20, which helped inform and shape the Coastal Act. Specifically, the Coastal Plan found that the area contained incredibly rich coastal resources, including at Elkhorn Slough and the adjacent agricultural lands, but that these resources were at risk from numerous sources, including urban growth and sprawl, water quality impairment, and groundwater overdraft and seawater intrusion. Specifically, the Coastal Plan found:

*The Pajaro Valley, covering 120 square miles, is one of the richest agricultural regions in California...but **increasing drafts of groundwater, for urban and agricultural use, have had adverse effects**; the water supply for 50 square miles of agricultural land between the Pajaro Valley and Marina is **currently threatened by saltwater intrusion**. The urban center of the valley, Watsonville (population 17,000), has grown rapidly, sprawling into surrounding farmlands. The healthy economy of the area, based on food production and processing, encourages expansion of Watsonville and its suburbs, Freedom and Pajaro. **Substantial growth of these communities would involve the loss of valuable agricultural lands** designated for protection under county plans and the Coastal Plan, and would necessitate expensive solutions to the water supply problem. **Plan policies call for concentrating development in existing urban areas, such as Watsonville, Pajaro, Castroville, and Moss Landing, rather than allowing continued conversion of agricultural land... [Elkhorn Slough] is threatened by locally planned expansion of existing industrial and harbor developments, and by residential development of the critical watershed....** Although the major part of Elkhorn Slough is in public ownership, neither the critical watershed nor the wetland resource itself is adequately protected.<sup>13</sup> (emphasis added)*

Thus, the Coastal Plan found that strong growth control protections were needed to protect coastal resources in North County, including policies addressing water quality, groundwater overdraft and resultant seawater intrusion, and agricultural protections, all with the overarching goal of preserving the area's rural nature. These recommendations were largely ultimately adopted in both the Coastal Act (including as evidenced by the inland extent of the coastal zone boundary that encompasses the entire Elkhorn Slough area (extending inland a distance of over 7 miles) so as to comprehensively plan for and protect it) and in the North County LCP's policies and standards, as described below.

## **1. Water Supply and Groundwater Resources**

### *Applicable Policies*

The Monterey County LCP includes an extensive policy framework meant to protect the area's rich coastal resources, including through policies that protect groundwater and the related basins'

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<sup>13</sup> California Coastal Plan Central Coast Subregion 5: Pajaro-Elkhorn (Part IV: Plan Maps and Regional Summaries, page 230).

safe yield, require an adequate and long-term water supply to serve new development, and protect and prioritize agriculture and other coastal-dependent development. Specifically, the North County LCP contains numerous policies and standards that protect North County's groundwater resources, including (where text in **bold** format means emphasis added):

***North County LUP Policy 2.5.1 - Key Policy.** The water quality of the North County groundwater aquifers shall be protected, and **new development shall be controlled to a level that can be served by identifiable, available, long term-water supplies.** The estuaries and wetlands of North County shall be protected from excessive sedimentation resulting from land use and development practices in the watershed areas.*

***North County LUP Policy 2.5.2.3.** New development shall be phased so that the existing water supplies are not committed beyond their safe long-term yields. Development levels that generate water demand exceeding safe yield of local aquifers shall only be allowed once additional water supplies are secured.*

***North County IP Section 20.144.020.VVVV.** Safe Yield/Sustained Yield or Long-Term Sustained Yield is the yield that a renewable resource can produce continuously over the long-term at a given intensity of management without impairment of the resource and other associated resources.*

***North County LUP Policy 2.5.3.A.1.** The County's policy shall be to protect groundwater supplies for coastal priority agricultural uses with emphasis on agricultural lands located in areas designated in the plan for exclusive agricultural use.*

***North County LUP Policy 2.5.3.A.2.** The County's long-term policy shall be to limit ground water use to the safe-yield level. The first phase of new development shall be limited to a level not exceeding 50% of the remaining build-out as specified in the LUP. This maximum may be further reduced by the County if such reductions appear necessary based on new information or if required in order to protect agricultural water supplies. Additional development beyond the first phase shall be permitted only after safe-yields have been established or other water supplies are determined to be available by an approved LCP amendment. Any amendment request shall be based upon definitive water studies, and shall include appropriate water management programs.*

***North County IP Section 20.144.140.B.3.a...** That remaining build-out figure is 1,351 new lots or units. This figure shall include senior citizen units, caretaker units, multiple family dwellings, employee housing, and lots created through subdivision approved after County assumption of permitting authority, but shall exclude development of a single-family dwelling on a vacant lot of record.*

***North County IP Section 20.144.070.E.11.** Development shall not be permitted if it has been determined, through preparation of a hydrologic report, or other resource information, that: a) the development will generate a water demand exceeding or adversely impacting the safe, long-term yield of the local aquifer; and, b.) there are no project alternatives and/or mitigation measures available that will reduce the*

*development's water use to a level at which it will not exceed or adversely impact the safe, long-term yield of the local aquifer.*

***North County LUP Policy 4.3.5.4.*** *Where there is limited land, water, or public facilities to support development, coastal-dependent agriculture, recreation, commercial and industrial uses shall have priority over residential and other non-coastal-dependent uses.*

***North County IP Section 20.144.140.A.1.*** *Development of non-coastal dependent uses shall require availability of adequate sewer, water, and transportation services. Prior to the application being determined complete, the applicant shall demonstrate adequacy of water, sewer, and transportation services.... **Where services are determined not to be adequate for the proposed non-coastal dependent use, only coastal dependent uses shall be permitted.***

***North County LUP Policy 4.3.5.7.*** *New subdivision and development dependent upon groundwater shall be limited and phased over time until an adequate supply of water to meet long-term needs can be assured. In order to minimize the additional overdraft of groundwater accompanying new development, water conservation and on-site recharge methods shall be incorporated into site and structure design.*

***North County LUP Policy 4.3.6.D.1.*** *Land divisions for residential purposes shall be approved at a density determined by evaluation of site and cumulative impact criteria set forth in this plan. These include geologic, flood, and fire hazard, slope, vegetation, environmentally sensitive habitat, water quality, water availability, erosion, septic tank suitability, adjacent land use compatibility, public service and facility, and where appropriate, coastal access and visual resource opportunities and constraints.*

***IP Section 20.64.180.D.*** *Density of Development Standards. The maximum density established under this Section shall be utilized as the basis to begin consideration of the density appropriate for development of a specific parcel. Such established maximum density is not a guarantee of possible development potential of any given property. Density of development shall ultimately be determined through the permit process, consideration of site conditions on the specific property and of the details of the specific development proposal without imposing undue restrictions on private property. Such considerations may include but are not limited to: ... 2. Available supply and priorities for water....*

***North County LUP Policy 4.3.6.D.5.*** *Where public facilities or water supply necessary to support residential development are limited, residential growth should be phased to allow sufficient time for these essential elements to be provided.*

***North County LUP Policy 7.3.1.*** *A growth management program phasing residential and, where appropriate, commercial and industrial development may be instituted in the North County coastal zone (and in other parts of the County) based upon natural resource protection, water availability, and public facility capacities and constraints. A phased residential allocation system may be developed. Development and subdivision*

*proposals could be processed at set periods during the year. If there are large numbers of applications, those not accepted in a particular process could be considered the following period. During evaluation of applications, priority should be given to coastal-dependent or related uses and development of existing parcels.*

To summarize, the LCP includes policies and standards that require all new development limited to a level that can be served by an identifiable, available, and long-term water supply (LUP Policy 2.5.1), including by only authorizing an amount of development that can be served by the safe yield groundwater extraction level (LUP Policies 2.5.2.3 and 2.5.3.A.2). The LCP defines “safe yield” as the amount of extraction that the resource can produce over the long-term without impairment of the resource and other associated resources (North County IP Section 20.144.020.VVVV). The LCP does not contain a specific numeric safe yield amount for each groundwater basin, but instead requires definitive water studies, hydrologic reports, and the most updated resource information to determine appropriate safe yields and the amount of new development such a yield can support (LUP Policy 2.5.3.A.2 and IP Section 20.144.070.E.11).

Consistent with the above-discussed policies and standards, the LCP also requires development to be phased so that water supplies are not committed beyond their safe yield and, if the safe yield is already exceeded, only allows additional development to proceed once additional water supplies are secured that will bring the basin back into LCP-required safe yield state (LUP Policy 2.5.2.3). The LUP further requires that where there is limited water supply to support development, coastal-dependent uses (such as coastal-dependent agriculture, recreation, commercial, and industrial uses) shall have priority over residential and other non-coastal-dependent uses (LUP Policy 4.3.5.4). Finally, LUP Policy 4.3.5.7 requires new subdivisions and development dependent upon groundwater to be limited and phased over time until an adequate supply of water to meet long-term needs can be assured. Should studies suggest that the underlying groundwater basin is being extracted in a manner exceeding its safe, long-term yield, then the LCP affirmatively requires denial of a proposed project, particularly low-LCP priority residential subdivisions, unless and until additional water supplies are secured and the safe yield level is reached (IP Sections 20.144.070.E.11, 20.144.140.A.1, and Policy 2.5.2.3).

In sum, these policies and standards only authorize a level of development that can be supported by the safe yield extraction level of the underlying groundwater basin, and do not allow non-coastal dependent uses, particularly residential subdivisions, when such uses cannot be served by water within the safe yield level.

Overall, these policies are meant to implement applicable Coastal Act policies that require new development to be served by adequate public services (Section 30250), in a manner that does not significantly and adversely impact groundwater and other coastal resources (Sections 30231 and 30250), and by prioritizing certain land uses, such as agriculture, over others, such as residential subdivision (Section 30222).

#### *Analysis*

##### *Groundwater Overdraft and Safe Yield Calculations*

The subject site is located in North Monterey County, which has severe groundwater overdraft and resultant seawater intrusion problems. Virtually all of the agricultural, commercial, and residential development in North Monterey County relies on groundwater pumped from local

wells, with agriculture accounting for approximately 85 percent of the water demand. When the North County LUP was adopted in 1988, it acknowledged that the area had been experiencing overdraft problems for some time, but was not able to quantify the amount of overdraft or determine what the safe yield was at the time. Rather, the LUP noted that:

*A study for the State Department of Water Resources in 1977 indicated a general groundwater overdraft of about 15,500 acre-feet annually in the North County area. A more detailed study by the U.S. Geological Survey in 1980 confirmed the overdraft of the Aromas Sand Aquifer. The report estimated a study area annual overdraft in the North County area of about 1,500 to 8,000 acre-feet. However, due to the depth of the water-bearing Aromas Sands, its high storage capacity, and the overall complexity of geologic and hydrologic considerations, **the long-term safe yield of the aquifer is difficult to estimate...***

*It is evident that continued overdraft in the North County will lead to increasing saltwater intrusion and lower water tables. In some areas, water shortages may occur. Managing the demand for water generated by agricultural use and residential and commercial development within the limits of attainable long-term water supply sources will be a major challenge for the area in the coming years. **Additional information is urgently needed to help determine the long-term safe yield of North County aquifers.** The opportunities for obtaining a surface water supply should also be investigated. (emphasis added)*

In this context, the certified LCP included a policy framework that allowed for some development, but only in a cautious, phased manner commensurate with the area's safe yield and subject to a buildout cap that could only be exceeded once definitive water studies were developed and the safe yield was established. In other words, while there was no consensus on the precise quantification of the problem or on how to quantify the safe yield at the time the LUP was certified, the LUP was developed to manage the demand for water by establishing policies that phased development relative to safe yield, to be later quantified and understood using the best available science.

The LUP also limited the total amount of residential development in North County (beyond one home per legal parcel) by placing a maximum threshold on residential buildout until that safe yield level could be determined. Because the overdraft situation was not precisely known at time of LUP adoption, to be cautious, LUP Policy 2.5.3.A.2 establishes that no more than 50% of the maximum<sup>14</sup> residential buildout based on parcel size and subdivision potential (i.e., 1,351 units or lots) for the entire North County area may be allowed while the County pursued efforts to quantify the overdraft problem and arrive at a solution. The policy establishes this maximum as a cap until a new water supply is secured or once a safe yield is achieved, at which time this cap could be increased via LCP amendment.<sup>15</sup> However, that is a maximum possible threshold, and

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<sup>14</sup> The 50% buildout cap was derived from multiplying plan densities by area acreage. These buildout numbers do not account for potential resource constraints that might be identified when additional units or subdivision are proposed, and that might dictate a lower density (e.g., significant wetland areas and/or water resource constraints that preclude development). The LUP is clear that actual development potential is contingent on natural resource constraints and the availability of public services (e.g., LUP Policy 4.3.6.D.1 and IP Section 20.64.180.D).

<sup>15</sup> This policy applies to new subdivided lots and second units on existing lots. One home per vacant parcel (existing at the time of enactment of the LCP policy) is allowed independent of the 50% buildout number.



LUP Policy 2.5.3.A.2 includes a caveat that allows this cap to be reduced to limit groundwater use to the safe-yield level once it was determined, or if required in order to protect agricultural water supplies. Thus, the 50% build-out level is not determinative of the amount of development that the area's resource can support, but rather is an upper range that could be further reduced in order to protect groundwater resources once more was known about their status. Other LCP policies similarly state that development and density allowances are maximums, not entitlements, with new development limited by resource constraints and LCP requirements (e.g., LUP Policy 4.3.6.D.1 and IP Section 20.64.180.D).<sup>16</sup>

Since the time that the LUP was certified, the County has sponsored more definitive studies to determine the safe yield. The first study commissioned by the County, conducted in 1995 by Fugro West, calculated the groundwater overdraft for the area's five groundwater sub-basins on the order of 11,700 acre-feet per year (AFY), based off a defined safe groundwater withdrawal yield of 14,410 AFY and an actual extraction of 26,110 AFY. Subsequently, the 2002 *North Monterey County Comprehensive Water Resources Management Plan* (CWRMP), prepared by the Monterey County Water Resources Agency and EDAW, updated the 1995 analysis and calculated the overdraft to be as much as 16,340 AFY due to an increase in estimated water usage (while finding the safe groundwater withdrawal yield to be the same at 14,410 AFY) (see **Exhibit 6** for the North Monterey County groundwater aquifer geography).

Thus, these studies not only quantified the estimated safe yield for the collective groundwater basins, but the 2002 study also showed that the overdraft was more than what was first estimated (due to increased water usage) and that as a result of continued overdraft, the extent and severity of the resultant problems (e.g., extent of seawater intrusion, increased water contamination problems, number of abandoned wells, adverse effects on coastal agriculture, etc.) have increased over time. For example, in the Highlands North sub-basin, which would provide water to the proposed project, the 1995 Fugro West study calculated a sustainable yield of 2,920 AFY and historical groundwater demand of 4,780 AFY, resulting in a deficit of 1,860 AFY. Updated values provided in the 2002 CWRMP identified the same sustainable yield of 2,920 AFY, but updated the water demand estimates for the sub-area to be 5,621 AFY, for a total overdraft of 2,701 AFY. This represents an over 45% increase in the overdraft for the Highlands North sub-basin over the span of seven years.

The 2002 CWRMP also showed that long-term over-commitment of the aquifer threatens water supplies and other existing users due to the risk of lowered groundwater levels and seawater intrusion. The Fugro West study identified a general long-term trend of declining water levels in the area over the preceding 20 years, with 1994 water levels in some portions of North County being more than 40 feet below mean sea level (near Prunedale). Seawater intrusion results when wells pumped near the coast cause the water table elevation (or groundwater level) to drop below sea level. Once the water table elevation drops below sea level, seawater can migrate into the

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However, second units are no longer allowable in the North County coastal zone anyway due to water supply inadequacies per LCP amendment number LCP-3-MCO-15-0022-1, approved by the Commission in October 2015.

<sup>16</sup> The Commission has found that North County's buildout and density numbers are hypothetical maximums, whereby actual allowable buildout and density must be understood based on actual resource constraints and LCP requirements (see, for example, CDP applications A-3-MCO-04-054, A-3-MCO-05-027, A-3-MCO-06-044, LCP amendment MCO-MAJ-1-06, and CDP extension A-3-MCO-04-054-E3).

aquifer (from the ocean as well as from the tidally-influenced Elkhorn Slough system) and mix with freshwater, which increases the chloride concentrations in the groundwater pumped from these wells. The CWRMP maps entitled “Seawater Intrusion in North Monterey County” show that the 500-mg/l-chloride contour<sup>17</sup> has moved landward over time, from between 1,650 feet inland of the coast to 3,300 feet inland of the coast over the period between 1979 and 1993. Seawater intrusion threatens both agricultural and residential water uses. According to the CWRMP, the Springfield Terrace area (in the northwestern portion of North Monterey County) and other areas near Elkhorn Slough have been the most impacted by elevated chloride ion concentrations as a result of seawater intrusion, and many agricultural producers have had to abandon their water supply wells, mix salty well water with fresher water to reduce the chloride concentrations, or purchase reclaimed water for irrigating agricultural lands. Other agricultural and residential wells have had to be abandoned or drilled to deeper depths to reach unaffected portions of the aquifer.

In 2014, the Pajaro Valley Water Management Agency (Agency) updated its *Basin Management Plan* (Basin Plan).<sup>18</sup> The purpose of the Basin Plan is to serve as the principal document guiding all of the Agency’s major projects and programs, with the goals of reducing overdraft, halting seawater intrusion, and improving and protecting water quality within the entire Pajaro Valley Groundwater Basin. The 2014 Basin Plan updated the previously adopted version from 2002. The 2002 Basin Plan found that sustainable yield<sup>19</sup> was roughly 48,000 AFY and, with a then-current demand of 69,000 AFY, the basin’s groundwater supply was being overdrafted by roughly 21,000 AFY. The 2002 Basin Plan then described various programs intended to address this overdraft, including projects that reduced water demand as well as projects that increased water supply. One such identified water supply project was 13,400 AFY of new imported water from the United States Bureau of Reclamation-controlled Central Valley Project. However, due to funding issues and other project constraints, in early 2010 the Agency took formal action to remove this import pipeline from project consideration.

The updated 2014 Basin Plan calculated the entire Basin’s 2013 total water usage to be roughly 61,000 AFY, and calculated its overdraft at 12,100 AFY (assuming a sustainable yield of roughly 48,000 AFY). Although the 2014 Basin Plan calculated a reduced overdraft as compared to the 2002 Plan (21,000 AFY v. 12,000 AFY), the Basin Plan still concluded:

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<sup>17</sup> A concentration of 500-mg/l of chloride is the “Secondary Drinking Water Standard” upper limit and is used as a measure of impairment of water, and is therefore also the basis for determining seawater intrusion in wells.

<sup>18</sup> The *Basin Management Plan* quantified the overdraft condition of the entire Pajaro Valley Groundwater Basin, which extends into Santa Cruz County. The *North Monterey County Hydrogeologic Study* and the *North Monterey County Comprehensive Water Resources Management Plan*, the two previous studies on groundwater overdraft, quantified overdraft solely within the portions of the two groundwater basins (Salinas River and Pajaro Valley) located within the North County LCP area. Thus, the three reports share different geographic scopes resulting in large absolute calculations for the 2014 Basin Management Plan as compared to the 1995 Fugro West Study and the 2002 CWRMP, but all quantify overdraft within the project area.

<sup>19</sup> The 2002 Plan defined “sustainable yield” as “the maximum amount of groundwater that can be extracted from the aquifer without causing adverse effects...i.e. recharge = demand, and seawater intrusion [is] eliminated.”

**The Pajaro Valley groundwater basin is in severe overdraft, causing groundwater elevations to drop below sea level as shown in Figure ES-1 and leading to seawater intrusion. Seawater intrusion has caused chloride contamination of groundwater wells up to three miles inland, as shown in Figure ES-2. Seawater intrusion is an immediate and direct threat to the Pajaro Valley economy. The elevated chloride concentrations make the groundwater unusable for irrigating the high value, salt-sensitive crops in the coastal region of the Pajaro Valley.**<sup>20</sup> (emphasis added)

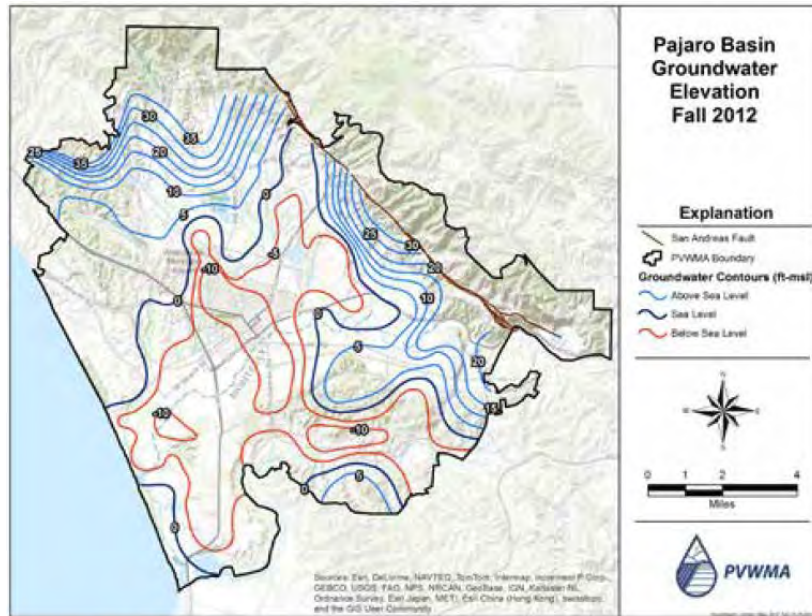


Figure ES-1. Groundwater levels in much of the basin are below sea level.

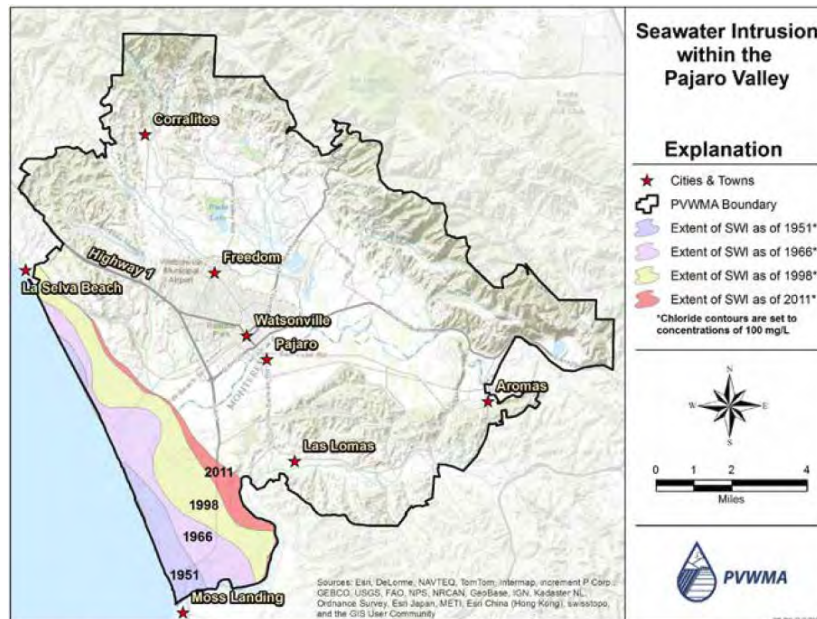


Figure ES-2. Seawater continues to degrade groundwater along the coast.

<sup>20</sup> Pajaro Valley Water Management Agency Basin Management Plan Update Executive Summary Page ES-1.

To erase the groundwater deficit (and to make up for loss of imported water relied on in the 2002 Basin Plan), the 2014 Basin Plan listed a set of projects meant to either increase supply (including through increased water recycling), optimize existing supplies (including through upgrades at existing facilities), and reduce water consumption. Specifically, one of the primary differences in the 2014 Basin Plan update from the 2002 Basin Plan is its reliance on conservation programs to reduce water demand, eliminate basin overdraft, and halt seawater intrusion. The 2014 Basin Plan relies on conservation programs, which are intended to result in 5,000 AFY of reduced water consumption, or over 40% of the total water consumption reduction necessary to stop basin overdraft. These conservation programs include agricultural irrigation efficiency projects, pricing strategies, and residential groundwater usage metering. In essence, the new Basin Plan provides an updated quantification of the basin's overdraft and serves as the blueprint for identifying measures meant to address and solve the Pajaro Valley Groundwater Basin's overdraft and seawater intrusion problems. Unlike the previous 2002 Plan, which relied heavily on new water supplies emanating from imported water from the Federal government, the updated Basin Plan eliminates the imported water allowance and instead relies heavily on reducing water demand through conservation strategies. The 2014 Basin Plan, however, acknowledges that it will take decades for these strategies to meet its overdraft reduction objectives.

Furthermore, although not a groundwater study commissioned by the County, implementation to date of the State's Sustainable Groundwater Management Act (SGMA) represents additional best available scientific information supporting the conclusion that groundwater in the Highlands North sub-basin (where the property at issue is located) is being over-extracted in exceedance of its safe yield. The SGMA was signed into law by the Governor on September 16, 2014. The 2014 SGMA establishes a new structure for groundwater management in California, requiring all overdrafted groundwater basins to be managed by local groundwater sustainability agencies (GSA) under the purview of a Department of Water Resources (DWR)-approved Groundwater Sustainability Plan (GSP). The legislation's intent is to provide for sustainable management of groundwater basins, to enhance local management of groundwater, to establish minimum standards for sustainable groundwater management, and to provide local groundwater agencies with the authority and the technical and feasible assistance necessary to manage groundwater. SGMA defines "sustainable groundwater management" as the "management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results,"<sup>21</sup> and defines "undesirable results"<sup>22</sup> as any of the following effects caused by groundwater conditions occurring throughout the basin:

- Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply
- Significant and unreasonable reduction of groundwater storage
- Significant and unreasonable seawater intrusion
- Significant and unreasonable degraded water quality
- Significant and unreasonable land subsidence

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<sup>21</sup> California Water Code Section 10721(v).

<sup>22</sup> California Water Code Section 10721(x)(1)-(6).

- Surface water depletions that have significant and unreasonable adverse impacts on beneficial uses of the surface water

SGMA defines “sustainable yield” as “the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus that can be withdrawn annually from a groundwater supply without causing an undesirable result.”<sup>23</sup>

Under the law, DWR is required to identify groundwater basins in “critical conditions of overdraft,” defined as when “continuation of present water management practices would probably result in significant adverse overdraft-related environmental, social, or economic impacts.” All groundwater basins currently designated as High or Medium Priority per DWR’s 2003 Bulletin 118<sup>24</sup> and designated as “critically overdrafted” by DWR would be designated as basins in “critical conditions of overdraft” and would be required to be managed under a GSP by January 31, 2020. All other High or Medium Priority basins must have an approved GSP by January 31, 2022.<sup>25</sup>

In July 2015, DWR developed a draft list of 21 “critically overdrafted” basins and sub-basins. A groundwater basin was determined to be critically overdrafted if it is currently subject to one or more “undesirable results,” as that term is defined in the law (see bulleted list above). The draft list included the Pajaro Valley Groundwater Basin. As such, in September 2015, PVWMA elected itself to be the Groundwater Sustainability Agency (GSA) for the groundwater basin. As the official GSA, PVWMA will prepare, submit to DWR for adoption, and be the primary agency tasked with implementing the GSP. In January 2016, DWR officially designated the Pajaro Valley Groundwater Basin as “critically overdrafted” (see map of DWR-designated “critically overdrafted” groundwater basins in **Exhibit 12**). Since the Pajaro Valley Groundwater Basin has been deemed a “High Priority” basin in Bulletin 118 since 1980, the basin will be deemed in “critical conditions of overdraft” and be required to have an approved GSP by 2020.

Thus, all four comprehensive information sources (i.e., the 1995 Fugro West study, the 2002 CWRMP, the 2014 Basin Plan, and the SGMA) conclude that North County’s groundwater basins, including the Highlands North sub-basin from which the proposed project would receive its water supply, are overdrafted and supplying water to existing land uses at an amount exceeding the aquifers’ safe yield. Therefore, North County’s groundwater basins are not meeting the performance standards and requirements specified in LUP Policies 2.5.2.3 and 2.5.3.A.2, and IP Section 20.144.070.E.11, which require North County’s groundwater basins to be within their safe yield extraction level to allow for certain new development, such as that proposed. As such, the proposed project is inconsistent with LUP Policy 2.5.2.3, which does not allow development when water supplies are committed beyond their safe yield, and only allows

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<sup>23</sup> California Water Code Section 10721(w).

<sup>24</sup> Bulletin 118 is DWR’s primary inventory of the state of groundwater basins in California, including the names and boundaries of basins and sub-basins, yield data, water budgets, and water quality.

<sup>25</sup> All other non-High and non-Medium priority groundwater basins are encouraged, but not required, to prepare a GSP.

development once additional water supplies are secured to bring the basin into its LCP-required safe yield state.

*Long-Term, Adequate Water Supply*

As described previously, the LCP requires all new development to be served by an identifiable, available, long-term, and adequate water supply (LUP Policy 2.5.1 and IP Section 20.144.140.A.1), and specifically requires new subdivisions dependent on groundwater to have an adequate, long-term water supply (LUP Policy 4.3.5.7). If water supplies are found not to be adequate, then IP Section 20.144.140.A.1 does not allow non-coastal dependent uses, thereby affirmatively requiring denial of low LCP (and Coastal Act) priority residential subdivisions. In essence, when essential services are limited, including when groundwater basins are overdrafted and not within their safe yield extraction level, as is the case in North County, the LCP attempts to manage groundwater usage by numerous measures, including through prioritizing certain land uses over others. Specifically, the LCP states that agriculture and coastal-dependent development have priority over residential development, particularly residential subdivisions, in order to ensure that non-priority land uses do not divert scarce water supplies at the expense of priority uses. For example, LUP Policy 4.3.6.D.5 limits residential growth until a water supply adequate to support residential development is provided, and, until that time when additional supply is secured, IP Section 20.144.140.A.1 instructs that, “where services are determined not to be adequate for the proposed non-coastal dependent use, *only coastal dependent uses shall be permitted*” (emphasis added). In essence, this IP standard affirmatively requires the reviewing authority to deny a non-priority use (including residential subdivision) when services are found to be inadequate, as it is with respect to water supply in North County. In other words, the LCP addresses two co-equal goals: ensuring development is served by an adequate, long-term water supply from groundwater in its safe yield state, *and* doing so in a manner that protects priority land uses over other development types. The LCP is clear that meeting groundwater safe yield limits is not an at-all-costs endeavor, but rather must be dealt with in a manner that protects and respects existing and proposed priority land uses.

The proposed project is a residential subdivision that would use water from groundwater aquifers that are already being pumped beyond their safe yield level. With respect to whether there is a long-term and adequate supply, the groundwater basin’s overdraft status and its resultant seawater intrusion impacts indicate that, in its current state, the basin cannot supply water over the long term in a manner that would not impair the basin and the resources that depend on it, and thus a project that would be served by it cannot be found to have a long-term, adequate water supply. Therefore, the proposed project is inconsistent with LUP Policy 2.5.1 (which requires development to be served by identifiable, available, long-term water supplies) and with IP Section 20.144.140A.1, which requires that adequate water be available to serve non-coastal dependent uses. There is not adequate water available for the proposed subdivision (and in fact there is not adequate water at safe yield to serve even *existing* development), which is a non-coastal-dependent use, and thus the proposed subdivision must be denied.

Since the project cannot be served by an adequate, long-term water supply from a groundwater source within its safe yield state, the proposed residential subdivision, a low-LCP priority land use, cannot be found consistent with the slew of LUP policies that prioritize other uses for such

scarce water supplies<sup>26</sup>. In addition, the proposed project would not only commit scarce water for a new low-priority residential subdivision, it will do so by *removing an existing priority agricultural use*. Thus, both aspects of this project—its *conversion* of an existing priority land use and its *construction* of a non-priority land use—are inconsistent with the aforementioned land use prioritization policies. While the Applicant estimates that the proposed project (including future to-be-built park facilities) will use an estimated 17.40 AFY of water (see **Exhibit 8** for the Applicant’s estimated water usage report) from existing off-site wells located within the same Highlands North sub-basin), slightly less than the current estimated water usage of 19.1 AFY, and thus argues that the proposed project will help ameliorate North County’s groundwater overdraft, the LCP is clear<sup>27</sup> that converting a priority agricultural use to a low-priority residential subdivision is not an allowable way to reduce water usage (see additional discussion on this topic subsequently in this report).<sup>28</sup> Thus, the proposed subdivision must be denied due to its numerous inconsistencies with LCP groundwater management and land use prioritization policies.

#### *Alternatives and Impact Mitigation*

With respect to IP Section 20.144.070.E.11, this standard prohibits development when it will generate a water demand exceeding or adversely impacting the safe, long-term yield of the local aquifer, and when there are no mitigation measures and/or project alternatives that will reduce the development’s water use to a level at which it will not lead to the aquifer’s long-term safe yield being exceeded or adversely impacted. In this case, the groundwater basins are already severely overdrafted at a magnitude that will require significant reductions in demand or new water inputs. Thus, *any* subdivision would commit a permanent water supply from a source that is already overdrafted, inconsistent with the LCP. In other words, because safe yield is already significantly exceeded, most all development, and certainly residential subdivisions that create *new* residential demand past the first home on existing legally established lots, is simply not approvable until the underlying aquifers are brought into equilibrium. It is not enough to have a ‘no net increase’ project (or even a slight reduction in water supply as argued by the Applicant in this case, which is also problematic for other priority land use issues as described above); rather the fundamental resource itself is required to be in equilibrium to be able to support new development in North Monterey County. This is a critical LCP policy distinction inasmuch as the basin is so significantly overdrafted at the current time as to make it virtually impossible for projects to address the overdraft situation in a way that would allow approval of their projects. And thus the LCP simply does not allow approval when such circumstances exist.

Similarly, some prior applicants for subdivisions in North Monterey County have argued before the Commission that offsets and retrofits can be used to overcome these LCP obstacles to allow

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<sup>26</sup> Including LUP Policy 2.5.3.A.1 (which sets a County-wide policy of protecting groundwater supplies for coastal priority agricultural uses), Policy 4.3.5.4 (which prioritizes coastal-dependent uses over residential and non-coastal-dependent uses when there is limited water to support development), Policy 4.3.6.D.1 (which only allows land divisions for residential purposes to be approved by evaluating LCP criteria), Policy 4.3.6.D.5 (which limits residential growth until a water supply adequate to support residential development is provided), 4.3.5.7 (which limits new subdivisions and development until adequate long-term water supplies are assured), and Policy 7.3.1 (which prioritizes applications for coastal-dependent or related uses).

<sup>27</sup> Again, see LUP Policies 2.5.3.A.1, 4.3.5.4, 4.3.6.D.1, 4.3.6.D.5, 4.3.5.7, and 7.3.1.

<sup>28</sup> The Commission has also found that converting priority agricultural uses to a low-priority residential subdivision is not an LCP-permissible way to reduce water consumption (see A-3-MCO-04-054 Sunridge Views Subdivision).

additional development in North County. However, water usage offsets as mitigation are not appropriate nor allowable under the core LCP policies described above, including as a ‘no net increase’ project cannot by itself resolve the fundamental water supply resource constraints in a way that would allow approval under the LCP given the way the LCP is structured. In addition, an offset/retrofit program is not realistically feasible in North Monterey County. While some past projects have proposed to mitigate their water demands by offsetting their anticipated water usage via retrofitting programs (i.e., requirements to offset a proposed development’s water usage through reducing a commensurate amount of water use offsite), there are multiple concerns that have subsequently emerged with this approach, including that they do not address nor are they consistent with other LCP requirements that only allow a level of development commensurate with the safe yield groundwater extraction level (as discussed above in terms of this proposed project), and because their efficacy and ability to provide bona fide, long-term water savings have not been borne out.<sup>29</sup> Furthermore, in these kinds of areas with water supply limitations, simply offsetting a proposed development’s estimated water usage cannot be used to meet LCP water availability requirements related to overall safe yield because such offsetting does nothing to improve the long-term sustainability of the basins. Instead, a reviewing authority must affirmatively show that long-term and sustainable water supplies are ready and available to serve the proposed development. In other words, retrofitting is an insufficient tool to overcome known existing water deficiencies in North County’s groundwater basins, *particularly* for low LCP-priority uses such as residential subdivisions. Thus, the proposed project is inconsistent with IP Section 20.144.070.E.11 because it will generate a water demand that exceeds the ability of the aquifer to serve it within its safe yield state, and there aren’t any identified viable project modifications and/or mitigations available to ensure that the proposed project can be served by groundwater at its safe yield level. As such, and because this IP standard makes an affirmative statement that “development *shall not be permitted*” (emphasis added) when these two findings are made, the proposed project must be denied.

#### *County LCP Interpretations*

While the County does not dispute the significant overdraft situation in North County, and agrees on its level of severity, the County has in the past construed the LCP’s buildout numbers as mandatory entitlements given that the North County LCP was certified with many areas, including the subject property, zoned for residential use knowing that the area suffered from groundwater overdraft conditions. In other words, and notwithstanding evidence of County

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<sup>29</sup> Indeed, in the Commission’s 2006 approval of CDP A-3-MCO-04-054, a 10-lot subdivision in North Monterey County’s Royal Oaks community, the Commission found the project largely inconsistent with numerous LCP requirements, but approved the project to settle a lawsuit and to test the efficacy of a water retrofit program in addressing North County groundwater issues. Thus, the Commission required the Applicant to completely offset the project’s anticipated water usage via retrofitting existing development within North County. However, the Applicant was unable to meet this condition, including because the Pajaro-Sunny Mesa Community Services District (District), a water provider in the North County area, concluded that there are no significant retrofit candidates or opportunities remaining in North Monterey County. Therefore, the District and the Commission were unable to approve a retrofit program for that project, and the Commission ultimately denied an extension of the CDP in November 2016 (CDP extension request number A-3-MCO-04-054-E3). That denial was based in part on changed circumstances affecting the project’s LCP consistency, including because of the inability to offset its water usage. Given this fact, and because such an offset program would not address overall basin safe yield requirements, a water retrofit/offset program is not an appropriate or feasible mitigation approach for the currently proposed subdivision project or others like it.



actions in other cases to the contrary,<sup>30</sup> the County has argued in certain past cases that the LCP already contemplated a certain amount of residential subdivision and use in North County, despite this lack of water, when it was certified. However, this buildout “override” interpretation is not supported by the LCP or by any of the LCP’s certification documents, and is inconsistent with past Commission actions and findings on this specific issue.<sup>31</sup>

First, the LCP is clear that maximum densities and maximum buildout numbers are only *theoretical maximums* that must be understood based on site constraints and other LCP requirements, including with respect to the availability of an adequate water supply (see, for example, North County LUP Policy 4.3.6.D.1<sup>32</sup> and IP Section 20.64.180.D<sup>33</sup>). In other words, development maximums (whether construed as a function of allowable density under the site’s LDR zoning or as a function of allowable buildout under specific North County LUP Policy 2.5.3.A.2) are *not* LCP entitlements. Interpreting the LCP provisions that identify maximum densities and buildout in order to support the proposed subdivision would suggest that the subdivision is approvable as a matter of right, despite overwhelming evidence that the Highlands North sub-basin is in overdraft beyond its safe yield and the proposed project would not ameliorate the overdraft situation. Instead, any opportunity for residential subdivision that is *generally* supportable by certain LCP policies (e.g., North County LUP Policy 2.5.3.A.2) may be limited for a specific project proposal when, considering the actual facts on the ground, other LCP provisions are applied that regulate allowable development on the basis of coastal resource protection for the particular project (e.g., North County LUP Policy 4.3.6.D.1 and IP Section 20.64.180.D). The LCP provisions are all read together, and the potential theoretical zoning maximums, or even increases in lot and residential density through subdivision at all, can only be understood in relation to resource and other constraints. As discussed previously, the LCP does not allow for any increase in units (per LUP Policy 2.5.3.A.2) based on the facts of this case.

Second, the Commission has consistently found that when the LCP was certified, the extent and magnitude of the groundwater overdraft was not precisely known, and thus the LCP required

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<sup>30</sup> Indeed, the County has addressed North County’s groundwater overdraft in numerous ways, including a building moratorium in North County between 2000-2002, adoption of a new General Plan in 2013 that prohibits subdivision in North County outside of the coastal zone until at least 2018 (where the prohibition may only be lifted if and when certain groundwater conditions are realized), and an accessory dwelling unit prohibition in the North County coastal zone (approved by the Commission in October 2015 in LCP-3-MCO-15-0022-1) due to a lack of available water supplies. Furthermore, the County has not approved a CDP for a residential subdivision in North County since this project’s approval in 2008.

<sup>31</sup> See, for example, Commission findings and actions on CDP application A-3-MCO-04-054 (2004), LCP amendment MCO-MAJ-1-06 (2008), CDP extension application A-3-MCO-04-054-E3 (2016), and CDP application A-3-MCO-05-027 (2017).

<sup>32</sup> North County LUP Policy 4.3.D.1 states in relevant part: “Land divisions for residential purposes shall be approved at a *density determined by evaluation of site* and cumulative impact criteria set forth in this plan. *These include ... water availability...*” (emphasis added).

<sup>33</sup> IP Section 20.64.180.D states in relevant part: “The maximum density established under this Section shall be utilized as the basis to *begin consideration* of the density appropriate for development of a specific parcel. Such established maximum density is *not a guarantee* of possible development potential of any given property. Density of development shall *ultimately be determined through the permit process*, consideration of site conditions *on the specific property* and of the details of the specific development proposal ... Such considerations may include but are not limited to... *Available supply and priorities for water...*” (emphasis added).

definitive groundwater supply studies to quantify it (which were first prepared in 1995 and subsequently in 2002, both of which documented significant overdraft in North County).<sup>34</sup> In other words, because the overdraft situation was not precisely known at time of LUP adoption, to be cautious, LUP Policy 2.5.3.A.2 established that no more than 50% of the maximum residential buildout based on parcel size and maximum subdivision potential (i.e., 1,351 units, again based on a straightforward mathematical application of maximum zoning to overall acreage without consideration of any site-specific resource constraints that may be applicable through other LCP policies) may be allowed while the County pursued efforts to quantify the overdraft problem and arrive at a solution. The policy establishes this maximum as a cap until a new water supply is secured or once safe yield is achieved, at which time this cap could be increased via LCP amendment. However, that is a maximum threshold, and LUP Policy 2.5.3.A.2 includes a caveat that allows this cap to be reduced to limit groundwater use to the safe-yield level once it is determined, or if required in order to protect agricultural water supplies otherwise.

The 50% build-out level is best understood as a then-approximation of what *might* be possible without consideration of any site-specific resource/site constraints, and it presumes that water would be available for same. To argue otherwise would suggest that the LCP explicitly provides for 1,351 additional units regardless of whether required future studies established that that level of development could not be accommodated by the North Monterey County water supply. We now know, and have known for some time, that there is inadequate water supply to support such development, and all parties – including the County – are in agreement that a significant overdraft problem exists. While the County has done significant work to address the overdraft situation, the overdraft condition in the groundwater basin remains acute. As such, and pursuant to the numerous LCP policies and standards that do not allow residential subdivision when groundwater basins are overdrafted, the proposed project is simply not approvable. Again, to construe the LCP otherwise to allow for residential subdivision in these rural areas when there is a distinct lack of available water supply fails to meet the objectives of the Coastal Act and the LCP, and is simply not supported by the LCP nor the facts surrounding the Commission’s LCP certification in this case. That is not to say that Policy 2.5.3.A’s buildout potential cannot be allowed in the future should groundwater aquifers be replenished and the overdraft eliminated (or if a specific project proposal somehow satisfies LCP coastal resource policies, including those relating to groundwater use), rather it is simply a recognition that the LCP’s water supply/use policies do not allow additional residential subdivisions at this time for this specific project proposal under the given facts.

*‘No-Net Increase’ Water Usage*

Finally, as discussed throughout this report, the LCP addresses two co-equal goals: ensuring development is served by an adequate, long-term water supply from groundwater in its safe yield state, *and* doing so in a manner that protects priority land uses over other development types. The LCP is clear that meeting groundwater safe yield limits is not an at-all-costs endeavor, but rather must be dealt with in a manner that protects and respects existing and proposed priority land uses. Thus, in many ways, the LCP’s policy framework is a proactive identification of the appropriate actions to take for evaluating development when the groundwater basin is overdrafted, as is the case here. As discussed earlier, the LCP states that the overarching

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<sup>34</sup> The North County LUP was certified in 1982, and the LCP was certified in 1988.

objectives are to both protect groundwater and water quality while also prioritizing agriculture (and coastal-dependent uses and recreation) over other types of development. The LCP then implements such objectives by not allowing low-priority residential subdivisions that cannot meet LCP resource policies, including with respect to groundwater use (instead, explicitly requiring their phasing and allowance *only when* additional water supplies are available that bring the groundwater basins to their safe yield state), *and* by ensuring that priority land uses, including new agricultural uses, must also protect water supplies and be as water efficient as possible. Thus, even though the Applicant argues that the proposed project will use similar, if not reduced, amounts of water (a ‘no-net increase’ use of water, an argument used for other similar subdivision projects, including through proposed water offsets and retrofits to make the project ‘water neutral’) as the existing agricultural operation, this analytical argument is not rooted in the LCP, including because it disregards the other key LCP factor: land use prioritization. That is, regardless of how much water a residential subdivision may use, even if it will use less, it is not LCP-permissible to address North County’s groundwater overdraft by paving it with new lots and residences. In this case, both aspects of the proposed project—its *conversion* of an existing priority land use and its *construction* of a non-priority land use—are inconsistent with the aforementioned land use prioritization policies. Allowing for the residential subdivision proposed here when the groundwater basin is overdrafted would frustrate the LCP’s fundamental structure on the overlapping issues of groundwater overdraft, water supply, and land use prioritization. In short, the LCP does not allow the conversion of agriculture and other higher Coastal Act and LCP priority land uses to a low-priority residential subdivision as a way to ameliorate North County’s groundwater overdraft.

### *Conclusion*

The proposed project constitutes a residential subdivision (a low LCP priority use) in an area with known water supply deficiencies, including that the groundwater basin from which the development will receive water is overdrafted and extracted in exceedance of its safe yield state. When such a combination results, the LCP affirmatively requires the proposed development to be denied. Therefore, because the project proposes subdivision that would ultimately allow for significant additional residential development and future park/recreational facilities within a groundwater basin that is severely overdrafted, the proposed project is inconsistent with the above-cited LCP water supply and priority land use policies and standards, and must be denied.

## **2. Environmentally Sensitive Habitat Areas**

The LCP defines environmentally sensitive habitat areas (ESHA), both broadly and specifically, and with the exception of resource dependent uses, prohibits development within them. The LCP also requires protection of areas adjacent to ESHA, requiring allowable development in this area to prevent habitat impacts. Applicable policies and standards include:

*North County LUP Policy 2.3.1. The environmentally sensitive habitats of North County are unique, limited, and fragile resources of statewide significance, important to the enrichment of present and future generations of county residents and visitors; accordingly, they shall be protected, maintained, and, where possible, enhanced and restored.*

**North County LUP Policy 2.3.2.1.** *With the exception of resource dependent uses, all development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall be prohibited in the following environmentally sensitive habitat areas: riparian corridors, wetlands, dunes, sites of known rare or endangered species of plants and animals, rookeries, major roosting and haul-out sites, and other wildlife breeding or nursery areas identified as environmentally sensitive. Resource dependent uses, including nature education and research, hunting, fishing and aquaculture, where allowed by the plan, shall be allowed within environmentally sensitive habitats only if such uses will not cause significant disruption of habitat values.*

**North County LUP Policy 2.3.2.B.4.** *A setback of 100 feet from the landward edge of vegetation of all coastal wetlands shall be provided and maintained in open space use. No permanent structures except for those necessary for resource-dependent use which cannot be located elsewhere shall be constructed in the setback area. Prior to approval of all proposed structures in the setback area, it must be demonstrated that the development does not significantly disrupt the habitat resource.*

**North County LUP Policy 2.3.2.2.** *Land use adjacent to location of 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 habitat impacts upon habitat values and where they do not establish a precedent for continued land development which, on a cumulative basis, could degrade the resource.*

**North County LUP Policy 2.3.2.3.** *New development adjacent to locations of environmentally sensitive habitats shall be compatible with the long-term maintenance of the resource. New subdivisions shall be approved only where significant impacts to environmentally sensitive habitats from development of proposed parcels will not occur.*

**North County LUP Policy 2.3.2.4.** *To protect environmentally sensitive habitats and the high wildlife values associated with large areas of undisturbed habitat, the County shall maintain significant and, where possible, contiguous areas of undisturbed land for low intensity recreation, education, or resource conservation use. To this end, parcels of land totally within sensitive habitat areas shall not be further subdivided....*

**North County LUP Section 4.2.** *The preservation of coastal resources including agricultural soils; environmentally sensitive habitat areas of estuaries and other wetlands, dunes, riparian areas, and oak woodland/maritime chaparral areas; water quality as impacted by point and non-point pollution, circulation and sedimentation from erosion; recreation and access opportunities; and the visual resources characteristic of the coast are prime issues of importance.*

**North County LUP Policy 2.3.3.A.4.** *Oak woodland on land exceeding 25% slope should be left in its native state to protect this plant community and animal habitat from the impacts of development and erosion. Development within oak woodland on 25% slope or less shall be sited to minimize disruption of vegetation and habitat loss.*

*North County LUP Policy 2.4.3.6. The County's diking, dredging, filling, and shoreline structures regulations shall incorporate Coastal Act Sections 30233(a) and (c), 30235, 30236, and 30607.1.*

*North County IP Section 20.144.040.B.3. New land uses and new subdivisions on parcels within 100 feet of environmentally sensitive habitats, as identified on the current North County Environmentally Sensitive Habitat resource map, other resource information, or planner's on-site investigation, 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, setbacks, and size, 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 is able to make a determination that the project will not set a precedent for continued land development which, on a cumulative basis, could degrade the habitat.*

*North County IP Section 20.144.040.B.4. Subdivisions which are completely within an environmentally sensitive habitat shall not be permitted.*

Thus, the LCP includes strong protections for ESHA, including wetlands and oak woodland habitat, both of which are called out explicitly as ESHA in the North County LUP (LUP Policy 2.3.2.1 and LUP Section 4.2, respectively). For wetlands, the LCP only allows a very specific set of uses, including resource dependent uses, restoration, and incidental public services, *and only* when there is no feasible less environmentally damaging alternative, when feasible mitigation measures are employed to minimize environmental effects, and when a requisite 100-foot protective buffer is employed. The LCP allows new subdivisions to be approved only where significant impacts to sensitive habitats will not occur (LUP Policy 2.3.2.3); prohibits subdivisions when they will adversely impact ESHA and/or when they are completely within ESHA (IP Sections 20.144.040(B)(3) and 20.144.040(B)(4), respectively); requires development within oak woodland to maximize protection of these habitats and to be sited to minimize disruption of vegetation and habitat loss (LUP Policy 2.3.3.A.4); and requires development adjacent to the habitat to be compatible with its long term maintenance, including through buffers (LUP Policy 2.3.2.2). Finally, the LCP requires the maintenance of large areas of continuous and undisturbed ESHA, and only allows low intensity recreation, education, or resource conservation uses within such areas (LUP Policy 2.3.2.4).

#### *Analysis*

The western portion of the project site, or roughly 16.5 acres, is comprised of oak woodland habitat, which, as described above, the LCP categorically designates as ESHA (see **Exhibit 14** for the EIR's oak woodland habitat map). The eastern portion of the site, or roughly 11 acres, is agricultural development comprised of strawberry row crops. A small wetland totaling 0.6 acres is located along the southern border of the project site adjacent to Hall Road. The proposed project would subdivide the oak woodland habitat into residential lots and commit those lots for single-family residences (including removing 17 oak trees). Residential subdivision and development are not allowed uses in ESHA. Thus, the project as proposed is inconsistent with the LCP's ESHA protection policies, including those that only allow resource dependent uses within ESHA and those that prohibit subdivisions when they will adversely impact and/or are

within ESHA (LUP Policies 2.3.2.1 and 2.3.2.3 and IP Sections 20.144.040(B)(3) and (B)(4)). Furthermore, while LUP Policy 2.3.2.3 requires development adjacent to ESHA to be compatible with the long-term maintenance of the resource, which typically consists of requisite buffers, the proposed project does not address, quantify, nor require any buffer between the development and the identified sensitive habitats. The project as proposed is thus inconsistent with LCP policy regarding development adjacent to ESHA as well. Finally, the removal of 17 coast live oak trees in order to facilitate residential subdivision does not conform with LCP policies that don't allow non-resource dependent development in ESHA (LUP Policy 2.3.2.1), that seek to minimize such tree loss (LUP Policy 2.3.3.A.4), and that do not allow subdivision and residential development within large areas of continuous undisturbed land, as is the case here (LUP Policies 2.3.2.1, 2.3.2.3, and 2.3.3.A.2; IP Section 20.144.040.B.3).

Second, the project proposes to convert the existing wetland into an engineered stormwater detention pond and place it under an easement. However, LUP Policy 2.4.3.6 (vis-a-vis incorporation of Coastal Act Section 30233(a)) only allows limited uses within wetlands, including restoration projects and incidental public service projects. The detention pond's purpose would be to capture and treat the increased stormwater generated from the adjacent new residential development that the subdivision would ultimately provide for. The pond is not meant to restore the wetland, and thus it is not a restoration project as that term is understood in the LCP. Furthermore, the proposed project is not an incidental public service. The Commission has previously considered what constitutes an incidental public service on numerous occasions. First and foremost is whether the project is initiated by a public agency or utility for a public purpose, such as replacement of old railroad bridges (CC-059-09); expansion of a railroad line (CC-052-05, CC-086-03) or modifications to an airport (CC-058-02). In this case, the stormwater detention pond would capture stormwater generated from private residential development. The proposed development is not initiated by a public agency for a public purpose, and does not constitute an incidental public service. Nor does the project seek to convert the wetland for any other allowable use under LUP Policy 2.4.3.6. Thus, the project's proposed conversion of the wetland to a stormwater detention pond is not an LCP-allowed use within a wetland<sup>35</sup>. In sum, the proposed improvements to the wetland are not allowable uses within this sensitive habitat, and are therefore inconsistent with the LCP in this regard.

### *Conclusion*

The project proposes to subdivide 16.5 acres of oak woodland ESHA into residential lots, as well as convert a 0.6 acre wetland into a stormwater detention pond. Neither of these uses is allowed within these habitat types. These project inconsistencies require project denial for this reason in addition to the groundwater resources and water supply problems described above.

While some of these inconsistencies could possibly be addressed by siting and design alternatives, including avoidance of subdivision and development within these habitat areas (which would result in a significantly truncated project), the project's inconsistencies with LCP groundwater resources and water supply policies and standards discussed above render such additional analysis and project modifications moot (because the project is still independently and irreconcilably inconsistent with LCP groundwater resource and water supply policies).

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<sup>35</sup> The Commission found that a similar stormwater detention pond proposed as part of the proposed Rancho Roberto subdivision in North Monterey County (CDP application A-3-MCO-05-027, denied on January 12, 2017) was not an LCP-allowed use in wetlands.

Even if the project were consistent with other LCP policies and standards with respect to water supply, the Commission would need the Applicants to submit an oak woodland ESHA/wetland delineation of the site, which would define the precise locations of ESHA and the required development buffers to ensure that the project could be approved and conditioned to be consistent with the ESHA protection policies and standards of the LCP. Given the degree of oak woodland identified to date, it would presumably leave a very small potentially developable area, and the project would need to be redesigned so as to ensure only LCP-allowable uses within these habitat types (e.g., not residential uses). In this case, however, the Commission is independently denying the project based on the lack of an adequate water supply, and thus such delineations and reduced project alternatives are not warranted at this time.

### 3. Water Quality

The North County LUP includes strong protections for water quality, including to protect Elkhorn Slough. The LUP policies are intended to ensure that new development does not adversely affect marine resources and other waterways, that construction minimizes sedimentation and runoff, and that drainage does not cause increased erosion. Some of the relevant LCP water quality policies include:

*North County LUP Policy 2.5.2.1. The County shall limit the kinds, locations, and intensities of new developments, including agriculture to minimize further erosion in the watersheds of Elkhorn Slough and Moro Cojo Sloughs and sedimentation of the Sloughs. All development shall incorporate all available mitigation measures to meet these goals, including at a minimum, the measures identified in Policy 2.5.3.C.6.*

*North County LUP Policy 2.5.2.5. Point and non-point sources of pollution of coastal waters shall be controlled and minimized. Restoration of the quality of degraded surface waters shall be encouraged.*

*North County LUP Policy 2.5.3.C.6. [in relevant part]*

*a. Existing sources of erosion shall be reduced through diligent enforcement of the County's most current Erosion Control Ordinance. The County shall institute a system of fines sufficiently large or shall take other actions to compel compliance by landowners or farm operators in violation of the ordinance.*

...

*c. Erosion control plans shall be required for all new development as set forth in the Erosion Control Ordinance. These plans shall incorporate measures for on-site reduction of bare ground and maximum retention of storm water runoff resulting from impervious surfaces. The plans shall be reviewed by the Soil Conservation Service, and shall be approved by the Director of Building Inspection or by the Planning or Public Works Director prior to issuance of any permits. In reviewing plans in the Coastal Zone, certification will be made for the following, in addition to other requirements of the Erosion Control Ordinance:*

- *That the amount of bare ground in the proposed development, is zero, or when combined with the bare ground from existing and committed land use, shall not exceed the Land Disturbance Targets shown on Table 1.*

- *That measures incorporated in the site plan to retain storm water runoff shall be designed to contain runoff resulting from a 20 year recurrence interval storm.*
- *That measures designed to reduce the amount of bare ground shall maintain a continuous vegetation cover throughout the year. Other types of ground cover may be used where it can be shown that vegetation is not suitable.*

...

- d. *All land clearing shall be consistent with the provisions of the County's Erosion Control Ordinance. No land clearing or grading shall take place between October 15 and April 15 in Watershed Restoration Areas or Critical Erosion Areas or other high erosion hazard areas unless specifically authorized by the Director of Building Inspection. Such authorizations shall generally be confined to agricultural operations in areas designated in this plan for Agricultural Preservation or Agricultural Conservation uses.*
- e. *Maximum retention of vegetation cover shall be required for all new development. In particular, natural vegetation should be retained to the fullest extent possible through careful siting and construction of new development.*
- f. *Property owners are encouraged to cooperate with the County in establishing Conservation Easements over areas of natural vegetation and on Critical Erosion Areas.*

#### *Analysis*

The proposed project would result in 54 new residences, along with commensurate urban infrastructure including roads, driveways, and other utilities, that will lead to the conversion of portions of the undeveloped land on the project site into new impervious surfaces. Such development could potentially result in increased sedimentation, increased oil and heavy metals from vehicles, and an overall decrease in water quality, including for nearby Elkhorn Slough. As proposed, the project does not minimize erosion and sedimentation of Elkhorn Slough and other coastal waters, nor does it control and minimize non-point source pollution, inconsistent with LUP Policies 2.5.2.1 and 2.5.2.5. Furthermore, the project proposes to remove coast live oak trees through the creation of new residential lots in oak woodland habitat, inconsistent with LUP Policy 2.5.3.C.6(e)'s requirement to retain the maximum amount of vegetation for all new development in order to address potential erosion concerns.

While some of these water quality concerns could potentially be addressed by siting and design alternatives, including avoidance of structural development within identified oak woodland areas, as well as requirements for water quality protection both during construction (e.g., construction best management practices, etc.) as well as post-construction (e.g., low-impact development strategies, bioswales, infiltration requirements, and erosion control plans consistent with LUP Policy 2.5.3.C.6), the project's inconsistencies with LCP water supply/groundwater resource policies render such additional analysis and project modifications moot (because the project is still independently and irreconcilably inconsistent with the LCP on these other points).

If the project were consistent with other LCP policies and standards with respect to water supply, the Applicants would need to submit water quality protection plans and project modifications to



protect water quality and avoid sensitive habitat areas to ensure that the project could be approved and conditioned to be consistent with LCP water quality protection policies and standards. In this case, however, the Commission is denying the project based on the lack of an adequate water supply and ESHA issues, and thus water quality protection modifications are not warranted at this time.

#### **4. Visual Resources and Community Character**

The North Monterey County LUP includes numerous policies aimed at protecting visual resources in North County, as well as policies that seek to retain North County's rural, agricultural character. Applicable policies include:

*North County LUP Policy 2.2.1. In order to protect the visual resources of North County, development should be prohibited to the fullest extent possible in beach, dune, estuary, and wetland areas. Only low intensity development that can be sited, screened, or designed to minimize visual impacts, shall be allowed on scenic hills, slopes, and ridgelines.*

*North County LUP Policy 2.2.2.3. Property containing land on scenic slopes, hills, and ridgelines when proposed for subdivision, should be subdivided so that the lots are situated to allow the highest potential for screening development and access roads from view. Lots and access roads should also be sited to minimize tree removal and visually intrusive grading during development....*

*North County LUP Policy 2.2.2.6. Agricultural uses on flat or rolling land should be preserved as a productive and visual resource....*

*North County LUP Policy 2.2.3.4. New roads providing residential, recreational, or agricultural access should be considered only where it has been demonstrated that common use of neighboring roads is not feasible. Access roads should not be allowed to intrude upon public views of open frontal slopes or ridgelines visible from scenic routes or viewpoints. Roadways shall be designed to conform to the natural topography in order to minimize grading, erosion, and the scarring of hillsides.*

*North County LUP Policy 2.5.3.C.6.e. Maximum retention of vegetation cover shall be required for all new development. In particular, natural vegetation should be retained to the fullest extent possible through careful siting and construction of new development.*

Thus, the LCP seeks to protect the rural, pastoral nature of North County, including by only allowing low intensity development that minimizes visual impacts on scenic hills, slopes, and ridgelines (LUP Policy 2.2.1), limiting new road and subdivision development to ensure screening and minimizing tree removal (LUP Policy 2.2.2.3), ensuring that grading and landform alteration are minimized and development respects natural topography (LUP Policy 2.2.3.4), and maximizing retention of existing vegetation cover (LUP Policy 2.5.3.C.6(e)).

*Analysis*

The proposed project would introduce a major suburban-style residential subdivision and associated infrastructure into a site that currently consists of oak woodland ESHA and agriculture (see **Exhibit 2** for area photos). The project proposes extensive grading, retaining walls, and landform alteration on a highly sloping parcel (with an elevation change of 60 feet from its top to its bottom), including significant removal of coast live oak, to convert the area's scenic habitats and rural, agricultural landscape into engineered, structural elements, including new access roads and infrastructure. The proposed project is thus inconsistent with LUP Policy 2.2.1 (which requires screening and visual impact minimization) and LUP Policy 2.2.2.3 (which requires new roads and lots from subdivisions to minimize tree removal and grading). Furthermore, the project's residences and improvements will be located on the ridge highly visible from Hall Road, thereby introducing suburban-style development on the ridge inconsistent with LUP Policy 2.2.3.4, which states that new roads should not be located on open frontal slopes and ridgelines visible from scenic routes or viewpoints. In fact, the proposed project is located on a broad, south-facing ridge, thus rendering the project inconsistent with: LUP Policy 2.2.1 (requiring low intensity development on ridgelines to be sited, screened, and designed to minimize visual impacts); Policy 2.2.2.3 (requiring subdivisions of property on ridgelines to be carried out in a manner such that the highest potential for screening of future development is achieved); and Policy 2.2.4.6 (which seeks to preserve the visual character of the Elkhorn Slough area). Thus, the project would introduce a suburban residential community that would dominate the public viewshed in this area, directly contrary to the numerous LCP policies requiring screening of development in Northern Monterey County. Finally, the project's significant vegetation removal, including tree removal in furtherance of residential subdivision within coast live oak woodland ESHA, is inconsistent with LUP Policy 2.5.3.C.6(e)'s requirement to maximize vegetation cover and retain natural vegetation to the fullest extent possible.

### *Conclusion*

The project's inconsistencies with LCP visual policies render project modifications (including alternatives that seek to retain vegetation and redesign the proposed development to ensure maximum screening from public views) moot (because the project is still independently and irreconcilably inconsistent with LCP water supply/groundwater resource and ESHA policies).

Even if the project were consistent with other LCP policies and standards with respect to water supply and ESHA, the Applicants would need to submit siting and design alternatives, including with renderings and visual simulations to ensure that the future residences anticipated by this subdivision could be approved and conditioned to be consistent with LCP visual resource and community character policies and standards as described above. In this case, however, the Commission is denying the project primarily based on the lack of an adequate water supply, and thus a visual impact analysis is not warranted at this time.

## **5. Agriculture**

The North County LUP includes numerous policies aimed at protecting agricultural resources in North County, as well as policies that seek to retain North County's rural, agricultural character. Applicable policies include:

*North County LUP Policy 2.2.2.6. Agricultural uses on flat or rolling land should be preserved as a productive and visual resource....*

*North County LUP Policy 4.3.5.1: The rural character of the coastal area of North County with its predominant agricultural, low-density residential and open space land uses shall be retained. Prime and productive agricultural soils shall be protected for agricultural use.*

**North County LUP Appendix B, Glossary of Terms:**

**Prime Agricultural Land/Soils:** *Those lands defined in Section 51201 of the Government Code as follows:*

- a) All land which qualifies for rating as Class I or Class II in the Soil Conservation Service land use capability classifications.*
- b) Land which qualifies for rating 80 through 100 in the Storie Index Rating.*
- c) Land which supports livestock used for the production of food and fiber and which has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture.*
- d) Land planted with fruit-or-not-bearing trees, vines, bushes, or crops which have a nonbearing period of less than five years and which will normally return during the commercial bearing period on an annual basis from the production of unprocessed agricultural plant production not less than two hundred dollars per acre.*

**Productive Agricultural Land/Soils:** *Those lands that qualify as Class III or IV in the Soil Conservation Service land use capability classification scheme (Soil Conservation Service). In North County, lands qualifying as prime under (c) and (d), of Section 51201 of the Government Code are included as productive agricultural lands.*

Thus, the LCP seeks to protect the rural, agricultural nature of North County, including through protection of agricultural uses and agricultural soils. Specifically, the LCP protects agricultural uses as a character-defining visual resource (LUP Policy 2.2.2.6), and, notably requires prime and productive agricultural soils to be “protected for agricultural use” (LUP Policy 4.3.5.1). The LCP defines “prime” and “productive” soils in a number of ways, including through the Soil Conservation Service’s (now known as the Natural Resource Conservation Service (NRCS), an agency of the United States Department of Agriculture) land use capability classifications. The land use classification system shows the suitability of soils for most kinds of field crops, ranging from a Class 1 designation as having the best soils for crop production to a Class 8 designation having the most restrictive soils. According to the LCP, Class 1 and 2 soils are “prime”, and Class 3 and 4 soils are “productive.”

*Analysis*

As previously described, roughly 11 acres along the eastern portion of the project site is currently used for irrigated strawberry row crops. According to the NRCS’s land capability classification, all 11 acres are either Class 2 or 3 soils (see the site’s soil classifications in **Exhibit 15**). As such,

some of the soils are designated prime (generally the flat area near Hall Road, classified as Class 2 Elkhorn fine sandy loam, 2 to 5 percent slopes) and the remainder is designated productive (Class 3 Elkhorn fine sandy loam, 5 to 15 percent slopes and Santa Ynez fine sandy loam, 2 to 9 percent slopes) under the LCP. While the project proposes to convert this entire agricultural operation to residential and future park uses, the LCP does not allow such agricultural conversion (again, see LUP Policy 4.3.5.1) for these uses. As such, the proposed project is inconsistent with the LCP's agricultural protection policies.

### *Conclusion*

The project's inconsistencies with LCP water supply and ESHA policies render project modifications (including alternatives that seek to retain agricultural soils and the existing agricultural production uses) moot (because the project is still independently and irreconcilably inconsistent with LCP water supply/groundwater resource policies).

Even if the project were consistent with other LCP policies and standards with respect to water supply and ESHA, the Applicants would need to submit siting and design alternatives, including avoidance of subdivision and development within and conversion to parks of existing agricultural areas, which would result in a significantly truncated project. In this case, however, the Commission is denying the project primarily based on the lack of an adequate water supply and ESHA, and thus such project alternatives are not warranted at this time.

## **6. Traffic**

The North Monterey County LUP includes numerous policies addressing transportation and road capacity. Applicable policies include:

***North County LUP Policy 3.1.2.6.** New development in rural areas should be located in areas with sufficient road capacity to accommodate additional transportation demand. Where necessary, the capacities of roads and public transit systems should be expanded to serve the transportation demand of areas specifically planned for concentrated development. In areas with highly congested traffic conditions, coastal-dependent development generating low volumes of traffic shall be preferred.*

***North County LUP Policy 3.1.3.1.** Due to the limited capacity of Highway 1 until the time it is expanded, development of coastal dependent industrial, agricultural, commercial, and recreational uses shall be given priority over non-coastal dependent development in areas where Highway 1 provides the major transportation access.*

***North County LUP Policy 3.1.3.2.** Salinas Road, San Miguel Canyon Road, Hall Road, and San Juan Road should be designated as major arterial roads serving the North County coastal area. These should be upgraded as necessary to maintain Level of Service C traffic conditions. Wherever feasible, through traffic on these roads should be routed to State highways.*

***North County LUP Policy 4.3.5.9.** Development and use of the land, whether public or private, must conform to the policies of the plan, must be consistent with the availability of*

*public services and with established urban service lines, and must meet resource protection standards set forth in the plan.*

Specifically, the LCP requires new development to be located in areas with sufficient road capacity (LUP Policy 3.1.2.6), specifies non-coastal dependent development, such as residential subdivision, to be a low priority for use of existing road capacity (LUP Policy 3.1.3.1), and specifies a Level of Service (LOS) “C” as the identified traffic capacity for Hall Road (LUP Policy 3.1.3.2). The project would introduce 54 new residences (and park and other development) and their associated traffic to an area served by two-lane rural roads. As such, the EIR concluded that “the proposed project would result in significant and unavoidable traffic impacts at intersections and highways for which no foreseeable or adequate improvements are foreseen,”<sup>36</sup> including because intersections along Hall Road in the immediate project vicinity already operate at LOS F<sup>37</sup>. The project thus introduces significant new development in a rural area with insufficient transportation infrastructure that already operates below LOS C, inconsistent with LUP Policies 3.1.2.6 and 3.1.3.2. Furthermore, the project allocates already congested and scarce road capacity for a low-priority LCP land use (residential subdivision), and is thus inconsistent with LUP Policy 3.1.3.1 in this regard as well.

### *Conclusion*

The project’s inconsistencies with LCP water supply policies render project modifications (including reduced project alternatives address traffic congestion) moot (because the project is still independently and irreconcilably inconsistent with LCP water supply/groundwater resource and ESHA policies).

Even if the project were consistent with other LCP policies and standards with respect to water supply, the Applicants would need to submit siting and design alternatives that address traffic impacts. In this case, however, the Commission is denying the project based on the lack of an adequate water supply and ESHA/agricultural inconsistencies, and thus such project alternatives are not warranted at this time.

## **7. Takings**

In addition to evaluating the proposed development for consistency with the certified LCP, in a denial situation the Commission must also evaluate the effect of a denial action with respect to takings jurisprudence. In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional taking, the Coastal Act provides a provision that allows a narrow exception to strict compliance with the Act’s regulations based on constitutional takings considerations. Coastal Act Section 30010 provides:

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<sup>36</sup> Rancho Los Robles Subdivision Final Environmental Impact Report, State Clearinghouse Number 2002091010 (the “Rancho Los Robles Subdivision EIR”), pages 3-12.

<sup>37</sup> Note that the EIR evaluated the impacts of a larger subdivision project consisting of 97 residences and commercial development. However, even though the project as now proposed is reduced as compared to the project evaluated in the EIR, the proposed project would still likely have significant impacts on traffic given the existing LOS situation and the fact that the project also includes park and other development, which would also contribute to traffic.

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

Although the judiciary would be the final arbiter on constitutional takings issues, the Coastal Act, as well as the State and Federal Constitutions, enable the Commission to assess whether its action might constitute a taking so that the Commission may take steps to avoid doing so. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the confidence that its actions are consistent with Section 30010 and constitutional takings jurisprudence. If the Commission determines that its action could constitute a taking, then the Commission could conversely find that application of Section 30010 would require it to approve some amount of development in order to avoid an uncompensated taking of private property. In this latter situation, the Commission could propose modifications to the development to minimize its Coastal Act and/or LCP inconsistencies while still allowing some reasonable amount of development.

The remainder of this section provides an analysis of whether, for purposes of compliance with Section 30010, denial of the proposed subdivision of the Applicants' property could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not, because the Applicants already enjoy economic uses on the property.

### ***General Principles of Takings Law***

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."<sup>38</sup> Similarly, Article 1, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner." Despite the slightly different wordings, the two "takings clauses" are construed congruently in California, and California courts have analyzed takings claims under decisions of both state and federal courts (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664.). The "damaging private property" clause in the California Constitution is not relevant to the current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The United States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 ("*Pennsylvania Coal*") [stating "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be

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<sup>38</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, 239).

recognized as a taking”]). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (*Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). The first category consists of those cases in which government authorizes a physical occupation of property (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426). The second category consists of those cases whereby government “merely” regulates the use of property and considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that in all fairness should be borne by the public as a whole (*Yee*, 503 U.S. at 522-523). Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (*Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S.470, 488-489, fn. 18). Here, because the current development proposal does not involve physical occupation of the Applicants’ property by the Commission, the Commission’s actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.* at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” (*Id.* at 1017-1018 (*emphasis* in original); *U.S. v. Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 [regulatory takings occur only under “extreme circumstances.”<sup>39</sup>]).

The second circumstance in which a regulatory taking might occur is under the multi-part, *ad hoc* test identified in *Penn Central Transportation Co. v. New York* (1978) 438 U.S. 104, 124 (“*Penn Central*”). This test generally requires at a minimum an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id.* at 124; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (*see Id.* at 632 [rejecting application of *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property (*MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the U.S. Supreme Court’s precedence “uniformly reflects an insistence on knowing the nature and extent

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<sup>39</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1029).

of permitted development before adjudicating the constitutionality of the regulations that purport to limit it” (*Id.* at 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (*Id.*). These general takings principles are reviewed for determining whether denial of the proposed project here would result in an uncompensated regulatory taking.

***Denial Would Not Result in a Regulatory Taking***

As analyzed above, application of the LCP’s water supply/groundwater resource policies and standards on their own require denial of the proposed subdivision on the grounds that the project cannot be served by an identifiable, available, and long-term water supply within the groundwater sub-basin’s safe yield at the present time and it is likely the case that, even for a revised project proposing a residential subdivision reduced in scale for this property, denial would still be appropriate for the same LCP inconsistencies with respect to water supply. However, based on the law and facts analyzed below, it is unlikely that such a denial of development would constitute an unconstitutional taking in this case because the Applicants *already* enjoy multiple economic beneficial uses of the property, including two single-family residences and significant agricultural development.

At this time, application of the LCP’s water supply and groundwater resources policies require denial of new residential subdivisions that require water in North Monterey County for which an available, long-term supply within the groundwater sub-basin’s safe yield has not been identified. Perhaps most importantly for determining whether denial of the proposed project would result in an unconstitutional taking, the Applicants already enjoy multiple beneficial economic uses on the property, including two existing single-family residences, and 11 acres of agricultural development including strawberry row crops. The property is and has historically been used for agricultural uses, including due to its prime and productive agricultural soils. Therefore, under a *Lucas* standard, denial of the Applicants’ proposed project will not deny the owners of all economically viable use of the land. For substantially similar reasons, under a *Penn Central* standard, denial of the proposed project does not result in substantial economic impact to the Applicants in relation to the property at issue considering the multiple existing economic uses on the property. Regarding the character of the government action, denial of the project ensures consistency with LCP policies (which itself is a valid local implementation of Coastal Act requirements) that strictly limit new residential subdivisions in North Monterey County based on County policy concerns over water supplies and groundwater resources. Regarding the Applicants’ reasonable-investment-backed expectations, it is unlikely that the Applicants could have expected to residentially subdivide the property as a matter of right given that the Applicants have benefited from *existing* economic uses on the site that are consistent with the site’s zoning, as well as the LCP policies governing land use in effect, and the fact that residential subdivisions of this size have not been approved in this area.

The California Court of Appeal for the Fourth District reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4th 1068 (*Pratt*) is also instructive here. In *Pratt*, the plaintiff argued that the Coastal Commission’s decision to deny a CDP for the plaintiff’s proposed project based on inconsistencies with LCP water requirements was an unconstitutional taking (*Id.* at 1081). The Court of Appeal upheld the Commission’s denial of the CDP and found that it was not an unconstitutional taking. It stated



that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) that the setting of priorities for water use in the face of an insufficient supply constitutes a taking (*Id.*). The court stated, “Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation that causes the harm” (*Id.*). Finally, the court noted that the plaintiff “is not entitled to whatever project it desires” and “has yet to submit proposals that contemplate a reduction in the size, scope, configuration or density of the project” (*Id.* at 1082). The court’s reasoning in *Pratt* is reflective of the reasons why denial here would not constitute a taking because the Applicants are not entitled to subdivide the property, and the Applicants are not even denied all economically beneficial use of the property because they currently enjoy multiple beneficial economic uses onsite, including two single-family residences and agricultural development.

In sum, the Commission’s decision to deny the proposed development, on the grounds that it is inconsistent with the LCP’s water supply and groundwater resources policies, would not result in an unconstitutional taking. Although the regulations require denial of the proposed new residential subdivision at this time, the Applicants already have multiple economically beneficial uses on the property, including two existing single-family residences and bona fide agricultural development.

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

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

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

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

*CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved. (a) CEQA does not apply to projects which a public agency rejects or disapproves.*

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

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

**APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

1. Fugro West, Inc., 1995. *North Monterey County Hydrogeologic Study, Vol. 1: Water Resources*. Prepared for Monterey County Water Resources Agency, October 1995.
2. Monterey County Water Resources Agency and EDAW, Inc., 2002. *North Monterey County Comprehensive Water Resources Management Plan*, January 2002.
3. Pajaro Valley Water Management Agency and Carollo Engineers, 2014. *Basin Management Plan Update*, February 2014.
4. Rancho Los Robles Subdivision Final Environmental Impact Report, State Clearinghouse Number 2002091010 (the “Rancho Los Robles Subdivision EIR”).

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

1. Applicants
2. Friends, Artists, and Neighbors of Elkhorn Slough
3. Pajaro-Sunny Mesa Community Services District
4. Pajaro Valley Water Management Agency
5. Monterey County Resource Management Agency
6. California Department of Water Resources
7. Office of Monterey County Supervisor John Phillips