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49th Day: 10/12/2017  
Staff: Kevin Kahn - SC  
Staff Report: 8/25/2017  
Hearing Date: 9/14/2017

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

**Appeal Number:** A-3-SLO-17-0040

**Applicants:** Tim and Taryn Orellana

**Appellant:** Christine Heinrichs

**Local Decision:** Approved by the San Luis Obispo County Board of Supervisors on July 11, 2017 (County application number DRC2015-00097).

**Project Location:** 930 Drake Street in the unincorporated community of Cambria in San Luis Obispo County (APN 023-086-039).

**Project Description:** Construction of a 3,046-square-foot single-family residence with a 528-square-foot attached garage and 445-square-foot deck and related improvements on an undeveloped lot.

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

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**Important Hearing Procedure Note:** The Commission will not take testimony on this “substantial issue” recommendation unless at least three Commissioners request it. The Commission may ask questions of the Applicant, any aggrieved person, the Attorney General or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally (and at the discretion of the Chair) limited to three minutes total per side. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing.

(*Id.*) If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

## SUMMARY OF STAFF RECOMMENDATION

San Luis Obispo County approved a coastal development permit (CDP) for the construction of a 3,046-square-foot single-family residence with a 528-square-foot attached garage and 445-square-foot deck and related improvements on a vacant 6,000-square-foot parcel in the unincorporated community of Cambria in San Luis Obispo County. The Appellant contends that the County's approval is inconsistent with the County's certified Local Coastal Program (LCP) provisions that address water supply and priority land uses, namely that there is an inadequate supply of water in Cambria to serve new development, particularly for low LCP priority residential development under that circumstance.

**Staff recommends that the Commission find that the appeal raises 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 the substantial issue portion of this appeal, a substantial issue is raised in terms of the LCP's water supply and priority land use provisions because the County's approval authorizes a low-LCP-priority use (i.e., a single-family residence) in an area with known severe water supply deficiencies, namely where there is not adequate sustainable water supply for even existing development, let alone new development. The LCP findings necessary to allow water service to this site cannot be made, including because the project is not a 'pipeline' project (which are allowed under certain other exacting circumstances, none of which are present here). The County's approval thus raises substantial LCP conformance questions about core public service capacities, and the ability/appropriateness of new water using development to be approved within Cambria.

On de novo review, it is well known that Cambria historically has suffered and currently suffers from a severely inadequate water supply for even *existing* development, let alone new development. As it stands today, Cambria remains under a new water connection moratorium from the Cambria Community Services District (CCSD, the public entity that provides Cambria's water supply), a Stage 2 water emergency that limits household water usage, and has an emergency desalination plant to augment existing water supply for existing uses that was permitted by San Luis Obispo County in 2014 via an emergency CDP to ensure that the community would not run out of water.<sup>1</sup> Furthermore, the area's water inadequacies do not just affect the built environment and its related community in Cambria, but also severely adversely affects the area's natural resources, including Santa Rosa and San Simeon Creeks, which provide habitat for state- and federally-listed fish and wildlife species, even as the creeks experience severe water quality and streamflow problems. As such, new residential development cannot

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<sup>1</sup> The CDP application that the CCSD has submitted to the County to both authorize the emergency desalination plant's emergency CDP and to permit a long-term desalination plant for a permanent water supply has remained unfiled with the County since June 2014.

meet LCP requirements to ensure an adequate water supply in a manner that does not impair coastal resources and that ensures the remaining supply is adequate for LCP priority land uses. Therefore, the proposed project is inconsistent with the LCP and must be denied.

That being said, the next question is what to do about Cambria's water situation. As described in this staff report, the Commission has a long history of trying to address Cambria's lack of water availability and associated development issues. There is much work to be done to better understand the impacts associated with current and future water supplies, the amount of development current and future supplies could support, and the LCP policies that may need to be updated to holistically address these interrelated issues over the long term. The current situation is clearly unsustainable, and Commission staff has offered and remains ready to work with the County, the CCSD, and all interested parties in crafting a solution to address Cambria's long-term water availability issues.

In sum, staff recommends that the Commission find that the appeal raises a substantial issue, and then deny the CDP for the project. The motions and resolutions to implement these recommendations are found on page 5.

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### APPENDICES

Appendix A – Substantive File Documents

### EXHIBITS

Exhibit 1 – Location Maps and Site Photos

Exhibit 2 – County’s Conditions of Approval and Approved Project Plans

Exhibit 3 – County’s Final Local Action Notice

Exhibit 4 – Appeal Contentions

Exhibit 5 – Comment Letters from Commission Staff to San Luis Obispo County

Exhibit 6 – Applicable LCP Provisions

Exhibit 7 – CCSD Stage 3 Water Shortage Emergency Declaration

Exhibit 8 – CCSD Emergency Desalination Facility Emergency CDP

## 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-SLO-17-0040 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-SLO-17-0040 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

### 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-SLO-17-0040, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-SLO-17-0040 and adopts the findings set forth below on grounds that the developments would not be in conformity with the San Luis Obispo County Local Coastal Program.*

## **II. FINDINGS AND DECLARATIONS**

The Commission finds and declares as follows:

### **A. PROJECT LOCATION AND DESCRIPTION**

The project site is located on a 6,000-square-foot vacant parcel located at 930 Drake Street in the community of Cambria in San Luis Obispo County. The parcel is located within Cambria's Urban Services Line and is surrounded by single-family residences. The County's approval authorizes the construction of a 3,046-square-foot single-family residence with a 528-square-foot attached garage and 445-square-foot deck. See **Exhibit 1** for location maps and site photos, and **Exhibit 2** for the County's approved project plans.

### **B. SAN LUIS OBISPO COUNTY APPROVAL**

On June 17, 2016, the San Luis Obispo County Planning Department Hearing Officer conditionally approved a CDP (#DRC2015-00097) for the single-family residence. The Planning Department's approval was appealed by Christine Heinrich and Greenspace to the County's Board of Supervisors. On July 11, 2017, the Board of Supervisors denied the appeals and affirmed the Hearing Officer's decision to approve the project.

Notice of the County's action on the CDP was received in the Coastal Commission's Central Coast District Office on August 1, 2017 (see **Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on August 2, 2017 and concluded at 5 p.m. on August 15, 2017. One valid appeal (made by Christine Heinrich) of the County's CDP decision was received during the appeal period. See **Exhibit 4** for the Appellant's appeal contentions.

### **C. APPEAL PROCEDURES**

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, 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 (Coastal Act Sections 30603(a)(1)-(4).) In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. (Coastal Act Section 30603(a)(5).) The County's approval of the project is appealable to the Commission because it is located in an LCP-designated sensitive coastal resource area.

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. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is not located between the nearest public road and the sea, and thus the additional public access and recreation finding would not be necessary if this project were approved.

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

## **D. SUMMARY OF APPEAL CONTENTIONS**

The Appellant contends that San Luis Obispo County’s decision to approve the project is inconsistent with LCP policies and standards relating to water supply and priority land uses. See **Exhibit 4** for the complete text of the Appellant’s appeal.

## **E. SUBSTANTIAL ISSUE DETERMINATION**

### **1. Substantial Issue Background**

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” (California Code of Regulations, Title 14, Section 13115(b)). In previous decisions on appeals, the Commission has considered the following factors in making such determinations: (1) the degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government’s decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. Even where the Commission chooses not to hear an appeal, Appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure Section 1094.5.

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

The Appellant’s chief contention is that Cambria’s water supply is inadequate to support any new development in the community. The LCP provides that a CDP for new development that requires water shall not be approved unless there is adequate water capacity available to serve

the proposed development (Public Works Policy 1 and Coastal Zone Land Use Ordinance (CZLUO) Section 23.04.430). The Appellant also asserts that the project is inconsistent with numerous other LCP water resources policies, including North Coast Area Plan Standards 4(A), 4(B), and 2(A). See **Exhibit 6** for these LCP policies and standards.

*Cambria's available water supply is inadequate to support the project*

Both Public Works Policy 1 and CZLUO Section 23.04.430 require development to be served by adequate public services, such as water supply, including by ensuring that supply remains adequate for existing development as well as the proposed new use. These LCP provisions expressly state that lack of adequate service is grounds for denial of a proposed project.

The County found the project consistent with the requirements of Public Works Policy 1 and CZLUO Section 23.04.430, reasoning that Cambria has an adequate water supply available to serve the project because of the project's status as a "pipeline project." As described below, while "pipeline projects" are those project that were in the application process as of November 15, 2001, and this project wasn't in the application process until 2014, the County reasoned that the project will be using a water allotment from a former pipeline project (i.e., a former pipeline project<sup>2</sup> that is transferring its water allotment to the proposed project) and thus this transfer de facto makes the proposed project a pipeline project. The County also reasoned that their conditions of approval requiring a 2:1 water offset, as well as the transfer of water from the Ivar Street site and retirement of that lot, collectively meet the LCP's intent in ensuring development is served by an adequate water source.

However, there are numerous flaws in the County's findings. First, the LCP defines "pipeline projects" as those projects that were in the application process as of November 15, 2001 when the Board of Directors of the Cambria Community Services District (CCSD, the public entity that provides water service to the community) declared a Water Code 350 emergency and enacted a moratorium on new water connections (see page 1 of **Exhibit 7**). If a project is not a pipeline project, it cannot obtain a new water connection (and therefore may not be approved). If a project is a pipeline project, it is not required to meet certain LCP standards, namely North Coast Area Plan Standard 4(A) requirements that new development assure no adverse impacts to Santa Rosa and San Simeon Creeks (the two sources for Cambria's water supply). However, a pipeline project must still be consistent with all other LCP policies and standards, including those that require all development to be served by an adequate water source, ensure that water supply remains available for LCP priority land uses, and ensure protection of coastal natural resources.

In this case, the County did not accept the project's application for processing until 2014, long after the November 15, 2001 pipeline project deadline. Thus, it clearly does not qualify as a pipeline project on this fundamental test. And while the County argued that simply transferring the water allotment from the Ivar Street site would make it a pipeline project, the Ivar Street

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<sup>2</sup> For an approximately 2,300-square-foot single-family residence that received an intent-to-serve letter from the CCSD in 2000 and approved by the County in 2002 (Commission tracking number 3-SLO-02-424) and located at 367 Ivar Street in Cambria.



project was never built, never received any active flowing water<sup>3</sup>, and has had its County-issued building permits expire. Thus, it is unclear whether even the Ivar Street project still constitutes a pipeline project, and even if it did, the current project (i.e., the project subject to this appeal at 930 Drake Street) was not pending in 2001, and the LCP makes no mention of allowing the transfer of pipeline projects' water allowances. On these facts, the project cannot qualify as a "pipeline project" because it is a different project with different Applicants and at a different location than the project that was in the application process in 2000. Thus, the project does not meet the LCP's "pipeline" project standards.<sup>4</sup> Given that the project does not meet the LCP's "pipeline" standards, the project does not meet the criteria to receive a CCSD water connection, and thus cannot be found to receive water from an adequate source on this fact alone. And the County's finding that this project is simply 'transferring' water from an existing water user (and thus not exacerbating the water supply problem) also raises a substantial issue because there has never been any actual water usage at the transfer site (the Ivar Street property).

And even if the project did qualify as a "pipeline" project, the project could not meet other LCP standards as there simply is not an adequate water supply in Cambria to serve *existing* development, let alone new development. Although the Commission and County approved some "pipeline projects" in the past as long as they verified their water demand offsets<sup>5</sup>, such approach was always interim, including until more information regarding the effect water withdrawals were having on coastal streams and related resources was better understood. In other words, it was acknowledged that there was a water supply problem, and a subset of no-net-increase projects would be allowed in the short term, until more information about the severity of the water supply problem was known. In the time since CCSD's new water connection moratorium and pipeline project exception, both established in 2001, much more is known about the severity of the water supply problem in Cambria. In fact, Cambria's water supply is currently in such a dire condition that, in an effort to avoid drastic consequences, including because the CCSD warned that Cambria would likely run out of water sometime between mid-October and mid-December of 2014,<sup>6</sup> the County approved an emergency CDP to authorize an emergency

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<sup>3</sup> Thus transferring its water allotment to the current project would represent a *new* water use, not a replacement water use, and would represent an additional demand on Cambria's already limited water supply.

<sup>4</sup> It should be noted that staff's interpretation of what does and does not constitute a pipeline project is not new, including as it was described in two recent CDP appeals (CDP Appeals A-3-SLO-13-0213 (Kingston Bay Senior Living LLC) and A-3-SLO-14-0044 (Fox)). In these two appeals, the projects were to use water transferred from previous pipeline projects that were not developed, and the County found that such transfer made the new projects pipeline projects. Two published staff reports for Commission action found that this approach was not supported by the LCP. However, prior to the Commission hearings on these projects, the applicants for both projects withdrew their projects from the County, which nullified their County-approved CDPs, and thus the Commission did not have the opportunity to act on the reports. That being said, Commission staff has subsequently had numerous discussions with County staff about the pipeline projects issue, as well as the lack of water supply in Cambria more broadly, and has relayed staff's position that new development, including this project, is not approvable under the LCP at this time. An example of this correspondence is Commission staff's comment letter to the San Luis Obispo County Hearing Officer prior to the hearing on this project as shown in **Exhibit 5**.

<sup>5</sup> Water offsets are accomplished through retrofitting existing developments with water saving appliances and fixtures.

<sup>6</sup> CCSD Press Release, 2/12/14 ("prospect of Cambria running out of water within the next three to six months...")

desalination water supply project. This emergency desalination plant is still extant<sup>7</sup>, and the follow-up CDP to recognize the emergency CDP and to make the plant permanent as a long-term solution to Cambria's chronic water supply inadequacies is still unfiled and pending before San Luis Obispo County (more information on this point subsequently in this report). Thus, simply offsetting a proposed project's water usage is not an appropriate way to find a project consistent with the LCP, including because such offsets don't overcome the underlying constraint that is Cambria's inadequate water supply for even existing development. Therefore, the County's finding that requiring a 2:1 water offset can make the project LCP compliant with respect to an adequate water source raises a substantial LCP compliance issue.

Moreover, as a matter of protection of regional water as a coastal resource, the LCP considers more than just the adequacy of water supply to meet Cambria's domestic water demand. A suite of other LCP policies require the protection of watersheds, groundwater, and riparian communities.<sup>8</sup> Taken together, the LCP requires development to be served by an adequate water supply in a manner that does not impair these coastal resources. Thus, the substantial issue on appeal is not just that Cambria does not have an adequate supply for human consumption and development; it is also that Cambria does not have an adequate supply for coastal resource needs either.

In light of these current facts in relation to LCP requirements, it cannot be concluded that any new development requiring water in Cambria, including the "pipeline projects" (which this project is *not*) and including water offsets and water transfers, can be found consistent with the County's certified LCP policies and standards requiring that there be adequate water capacity available to serve the new development. Accordingly, the Commission finds that the County's approval of the project raises a substantial LCP conformance issue.

*Approved water allocation may not preserve sufficient water for LCP priority land uses*

The approved project (again, regardless of whether or not it is a pipeline project) is not consistent with the LCP's requirement that adequate water be reserved for visitor-serving and other high LCP priority land uses. Specifically, LCP Recreation & Visitor-Serving Facilities Policy 2 prioritizes recreational development and commercial visitor-serving facilities over non-coastal dependent uses, and also requires that all uses be consistent with protection of significant coastal resources, including creeks and streams. The Appellant contends that the project is inconsistent with NCAP Standard 2(A), which expressly requires the CCSD to reserve and maintain 20 percent of its available water supply for visitor-serving and commercial uses (see **Exhibit 6** for

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<sup>7</sup> Though currently unable to operate, including pursuant to a July 2017 Cease and Desist Order from the Central Coast Regional Water Quality Control Board.

<sup>8</sup> For example, NCAP Planning Area Standard 4(A) requires that development "assure no adverse impacts to Santa Rosa and San Simeon Creeks"; Coastal Watersheds Policy 1 provides that the "long-term integrity of groundwater basins within the coastal zone shall be protected"; Coastal Watershed Policy 2 states that "[g]roundwater levels and surface flows shall be maintained to ensure the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organism, and for the protection of human health"; ESHA Policy 7 adds: "Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored"; and ESHA Policy 20 provides: "Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological system and ecological function of coastal streams shall be protected and preserved."

these cited policies). The Commission also required this 20-percent water supply reservation in a previous CDP (CDP 428-10, as amended) that allowed the CCSD to extract water from the Santa Rosa and San Simeon Creeks to provide Cambria’s water supply. This requirement to reserve water for visitor-serving uses is a manifestation of the protection and promotion of priority uses within the coastal zone, as provided in the County’s LCP and the Coastal Act. And finally, Public Works Policies 6 and 8 both state that if public services are inadequate and can only serve a limited amount of new development, uses having priority under the Coastal Act (e.g., coastal-dependent uses, visitor-serving uses, and essential public services) shall have priority to that scarce service over other non-priority development (e.g., single-family residential development).

As discussed herein, Cambria’s available water supply is inadequate to serve *existing* development, including as evidenced by the need for an emergency desalination plant. The project would overtax already scarce water demand for a non-priority single-family residential use, which is inconsistent with the above-cited LCP policies and standards that prioritize and reserve such scarce water for other higher priority land uses. In other words, given that the water supply is already inadequate to meet existing demand, any water that would be allocated to the project would reduce water available to all existing uses, including priority uses such as commercial lodging, restaurants, and recreational uses that facilitate and encourage Californians and others to visit and experience Cambria’s coastal areas, contrary to LCP requirements.

Thus, the County-approved project raises a substantial issue regarding its compliance with LCP priority land use policies and standards.

#### *Water Supply Conclusion*

In sum, the County-approved project raises substantial conformance issues regarding its consistency with numerous LCP policies and standards governing water supply, natural resources, and priority land uses, including Public Works Policy 1, CZLUO Section 23.04.430, and NCAP Planning Area Standards 2 and 4. At a very fundamental level, Cambria has a severely inadequate water supply for existing development, let alone new development, and has actually been on the brink of running out of water, resulting in the need to construct an emergency desalination plant to augment supply. And this lack of water for community consumption is in addition to the deleterious effects already-occurring withdrawals are having on the community’s creeks, riparian habitats, and other natural coastal resources. For these reasons, the County-approved project raises substantial LCP conformance issues.

### **3. Substantial Issue Analysis Conclusion**

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

statewide significance.

In this case, these five factors, considered together, support a conclusion that this project raises a substantial issue of LCP conformance. First, the County's approval authorizes low-priority residential development in an area with severe water supply inadequacies, whereby the County reasoned such approval was appropriate based on the project being a "pipeline" project. However, for the reasons described previously, the County's determination of this qualifying as a pipeline project is unwarranted, and even if it was warranted, the County still did not adequately analyze how the project would be served by an adequate water supply as required by the LCP. Thus, the County has not provided adequate factual and legal support for its decision that the approved development would be consistent with the certified LCP. Further, the project raises issues with respect to core LCP provisions and Coastal Act policies, including with respect to water supply, natural resources, and priority land uses, and thus the project raises issues of regional or statewide importance. Finally, because the project cannot be found consistent with the LCP, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP.

For the reasons stated above, the Commission finds that Appeal Number A-3-SLO-17-0040 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

## **F. COASTAL DEVELOPMENT PERMIT DETERMINATION**

The standard of review for the Commission's de novo CDP determination is the San Luis Obispo County certified LCP. All findings from the substantial issue determination section of this report are incorporated herein by reference.

### **1. Water Supply Resources**

In this de novo review of the proposed project, the Commission finds the project inconsistent with the San Luis Obispo County certified LCP's water supply policies for the same reasons that the Commission determined the project raised a substantial issue: namely, Cambria has a severely inadequate water supply for even *existing* development, let alone new development, including as evidenced by the need for the CCSD to obtain an emergency CDP and construct/operate an emergency desalination plant to ensure that the community would not run out of water. As such, the proposed project (regardless of whether it is a "pipeline" project or not, which this proposed project is *not* and regardless of whether it offsets its water usage) cannot meet LCP requirements to ensure an adequate water supply in a manner that does not impair coastal resources and that ensures the remaining supply is adequate for LCP priority land uses. Therefore, the proposed project must be denied on this basis alone.

As previously noted, Cambria's water supply depends on the groundwater aquifers of the Santa Rosa and San Simeon Creeks (collectively "the Creeks"). The Creeks naturally flow from their respective headwaters and both terminate into lagoons, which then connect to the Pacific Ocean. In addition to the domestic and agricultural demands for water from the Creeks, environmental demand, requiring adequate instream flows, is necessary to sustain the Creeks' high quality habitat for a variety of aquatic and terrestrial species. The United States Fish and Wildlife

Service (USFWS) designates the Creeks as critical habitat because they provide habitat for the federally threatened South-Central Coast Steelhead and the federally endangered Tidewater goby.

In the lower portion of the Creeks, the CCSD operates groundwater wells to extract water from the Creeks' groundwater basins to serve the demand of Cambria's urban water users. The CCSD's groundwater extractions are permitted pursuant to CDP #428-10, as amended, which the Commission initially conditionally-approved in 1977, shortly after the enactment of the Coastal Act. Included in the CCSD's CDP for water extraction are conditions limiting the total annual water production, as well as additional limits on water withdrawals during the dry season. The intent of these conditions was to ensure that adequate water would remain instream to support the Creeks' sensitive riparian habitats and to prevent overdraft of the groundwater aquifers.<sup>9</sup> Thus, a primary concern has been assuring that the pumping of the Creeks to serve existing and planned development does not adversely impact riparian habitats or otherwise negatively impact groundwater sources. This concern has been incorporated into the LCP, which expressly identifies the need for instream studies of the Creeks, including studies that describe the impacts of water withdrawals on the Creeks' sensitive riparian habitats, and studies of the impacts on the Creeks in consecutive drought years. The Commission too has repeatedly requested that the CCSD perform the required instream flow studies to provide the information necessary to make informed decisions regarding the adequacy of the water supply required under the LCP.

Recently, a number of other studies have been published, including instream studies that analyze both the Santa Rosa and San Simeon Creeks, providing decision-makers with the most current and best available science regarding the health of the Creeks' ecosystems. One such study was released in January 2014: *San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study)*.<sup>10</sup> In this study, scientists found that both of the Creeks' instream flows in the summer of 2013 were inadequate to meet even the bare minimum necessary to maintain aquatic habitat systems. The study expressed particular concern for Santa Rosa Creek, which had no flow in the summer of 2013, rendering the creek incapable of providing steelhead habitat during that time. The study further found that the Santa Rosa Creek lagoon conditions were "worsened by low stream flows resulting from excessive groundwater pumping and diversions...." Other recent studies of the Creeks have shown similar adverse impacts. For example, the *South-Central California Coast Steelhead Recovery Plan* (December 2013), which included an evaluation of the watershed conditions of the Creeks, specifically states that groundwater extraction is a significant threat to the Creeks' riparian habitats.<sup>11</sup> Therefore, these studies with the best currently available science independently demonstrate that the Creeks have inadequate water to sustain the Creeks' sensitive riparian habitats as required under the LCP.

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<sup>9</sup> Overdraft is when water is pumped beyond the safe yield of a groundwater aquifer, leading to adverse impacts, such as subsidence, in which an aquifer's geological structures compress, which may result in irreparable damage to an aquifer's capacity to store water. Overdraft can also cause seawater to intrude into an aquifer causing degradation of the quality of the freshwater supply. Both subsidence and seawater intrusion are known threats to the Santa Rosa and San Simeon Creeks' groundwater aquifers.

<sup>10</sup> See Appendix A #1.

<sup>11</sup> See Appendix A #2 at 12-10:12-13.

In sum, Cambria's sole sources of water, i.e., Santa Rosa and San Simeon Creeks, lack adequate water needed to protect the Creeks' sensitive riparian habitats, groundwater aquifers, and wetland lagoons. It is therefore well understood that an additional water supply is required for Cambria to provide reliable water for both habitat and for community consumption.

To address Cambria's critically low water supplies, as described previously, the CCSD Board of Directors enacted a moratorium on new water connections as part of the Board's Water Code 350 emergency declaration on November 15, 2001. On January 30, 2014 the CCSD Board declared a Stage 3 Water Shortage Emergency<sup>12</sup> and acknowledged it does not have adequate water supply to support Cambria's existing water demand (see **Exhibit 7**), and in 2014 the County granted the CCSD an emergency CDP (see **Exhibit 8**) for an emergency desalination facility to provide an emergency water supply to Cambria.<sup>13</sup>

Thus, as it stands today, Cambria remains under a new water connection moratorium, a Stage 2 water emergency, and the CDP to both authorize the emergency CDP and to permit a long-term desalination plant for permanent water supply has remained unfiled with the County since June 2014. On this point, the CCSD has modified its proposed project from an emergency/supplemental supply project that would serve only existing development to one that is proposed to serve all of Cambria's existing and future growth (named the "Cambria Sustainable Water Facility Project"). The CCSD recently completed an Environmental Impact Report for this project and it remains under review with San Luis Obispo County.

In conclusion, there remains much work to be done to address Cambria's water situation, but this work needs to be done in order to ensure there is an adequate water supply to serve new water-using development. Until then, water-using development such as the proposed project cannot be found consistent with the LCP.

## **2. Other Issues**

Typically, the proposed project would be evaluated for consistency with the LCP's policies and standards related to visual resources, hydrology and water quality, land use and zoning, etc. However, because the project is being denied based on a lack of adequate water supply, and this basis alone warrants denial of the proposed project, these issues need not be evaluated in this de novo review.

## **3. Takings Analysis**

In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions to deny a CDP could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional taking, the Coastal Act provides a

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<sup>12</sup> On March 23, 2017, the CCSD Board voted to lower the drought designation to Stage 2, meaning that outdoor residential watering may be allowed. However, the Water Code 350 declaration prohibiting new water hookups remains in effect.

<sup>13</sup> As conditioned by the emergency CDP, the facility is limited to providing water during emergency situations only for existing development within the community of Cambria.

provision that allows a narrow exception to strict compliance with the Act's regulations. Coastal Act Section 30010 provides:

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

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

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the proposed development on the Applicant's property could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not constitute an unconstitutional taking at this time.

### **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>14</sup> Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner."

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

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<sup>14</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).

*Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S.470, 488-489, fn. 18.] The Commission's actions here are evaluated under the standards for a regulatory taking.

The Court has identified two circumstances in which a regulatory taking may occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved. [*Id.* at 1014]. The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless.” [*Id.* at 1016-1017 (*emphasis* in original); *Riverside Bayview Homes*, 474 U.S. at 126 (regulatory takings occur only under “extreme circumstances.”)].<sup>15</sup>

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

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

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

As analyzed above, application of the LCP requires denial of the proposed development on the grounds that Cambria lacks sufficient water supply. However, based on the law and facts analyzed below, it is unlikely that such a temporary denial of development, based on lack of available water supply, would constitute an unconstitutional taking in this case.

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<sup>15</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).



At this time, the fact that the proposed project site does not have an adequate water supply contrary to LCP requirements warrants denial of a CDP for new development in Cambria that requires water. However, denial of a CDP here does not result in a taking because the applicant's inability to establish an adequate water supply is the cause for denial here, rather than the regulations which merely require a showing of an adequate water supply in order to pursue development. Based on past project denials, the Commission takes the position that lack of available water supply does not render Commission denial of a CDP on that basis as a taking. Furthermore, the position that denial of the proposed project will not result in a taking is also consistent with the California Court of Appeal for the Fourth District's reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4th 1068 (*Pratt v. CCC*). In *Pratt*, the plaintiff argued that the Coastal Commission's decision to deny a CDP based on lack of water was an unconstitutional taking. The Court of Appeal upheld the Commission's denial of the CDP and found that it was not ripe for an unconstitutional takings claim. Still, in dicta the court stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, "Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm." [*Id.*] The court also found that an "intent-to-serve letter" from a community water supplier did not change the result because there is no rule that the water company's determination is definitive. [*Id.*] "It is undisputed," the court continued, "that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft." [*Id.*] The court further reasoned that the plaintiff-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. As in *Pratt*, in this case it is the lack of water in Cambria, not the LCP regulation, that has delayed the Applicant's ability to develop the site.

Although CDP denial precludes the proposed residential development at this time, this is only due to a factual circumstance of a temporary nature on the project site. Once an adequate water supply becomes available (either naturally or through active planning efforts as discussed previously in this staff report), the applicant can resubmit a new application for an economically beneficial use of the property. For substantially the same reason, consideration of a takings claim is not ripe at this time as the Commission has not definitively settled the question of what development will be allowed at this site.

Furthermore, it is worth noting that the Applicant purchased the subject property in 2012 (and then transferred the property to their trust in 2014). Therefore, the Applicant purchased the property over a decade after the CCSO enacted its moratorium on new water connections, and five years after the North Coast Area Plan was updated in 2007 to incorporate the "pipeline project" grandfather provision. Thus, a reasonable person purchasing the property site in 2012 would have known both the on-the-ground facts of the extreme lack of adequate water supply in the community of Cambria, as well the legal limitations on new water connections for development proposed in Cambria.

Finally, it is also worth noting that the relevant LCP policies do not prohibit use of property, but rather require as a precondition to project approval a showing of adequate water supply, consistent with LCP policies ensuring a sustainable water supply and prioritizing water use given the extreme lack of water supply in this community. Thus, it is not any prohibitive effect of the LCP policies which warrants denial of the project here, but rather the practical inability of the proposed project to demonstrate minimum compliance with LCP requirements to proceed with development.

In sum, it is unlikely that the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with the LCP, would result in an unconstitutional taking. Although application of the water supply regulations preclude new development at this time, this effect of the regulation is temporary in nature only until the applicant can demonstrate an adequate water supply for the proposed project and is caused by the fact that there are insufficient water resources in Cambria generally and at the project site specifically, rather than any prohibition on development by the LCP policies themselves.

## **G. 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. *San Luis Obispo County Regional Instream Flow Assessment* – Prepared for Coastal San Luis Resource Conservation District, Prepared by Stillwater Sciences, January 2014.
2. *South-Central California Coast Steelhead Recovery Plan: San Luis Obispo Terrace Biographic Population Group*, December 2013.