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APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATIONS & DE NOVO HEARINGS

Application Numbers: A-3-SLO-09-032 (Kolb Subdivision)
 A-3-SLO-09-033 (Cefalu Subdivision)

Applicants: Kit Kolb; Fred and Barbara Cefalu

Appellants: Commissioners Shallenberger and Wan

Local Government: San Luis Obispo County

Local Decisions: San Luis Obispo County Coastal Development Permit (CDP) Application Numbers SUB2007-00054/C07-0223 (Kolb) & SUB2007-00069/C07-0254 (Cefalu), both approved by the San Luis Obispo County Subdivision Review Board on June 1, 2009.

Project Locations: South side of Bayview Heights Drive, approximately 1,133 feet (Kolb) and 920 feet (Cefalu) southeast of Covey Lane, and adjacent to the Morro Dunes Ecological Reserve in the community of Los Osos (APNs 073-324-003 (Kolb); 073-324-004 (Cefalu)).

Project Descriptions: Subdivisions, through the issuance of Conditional Certificates of Compliance, to create a 2.9 acre parcel (Kolb) and a 1.99 acre parcel (Cefalu)

Staff Recommendations: Substantial Issue Exists for both projects; Denial for both projects

Staff Note: Due to the common factset for these two appeals, including their adjacency and shared issues, the two appeals and the underlying CDP applications are assessed together in this staff report, and they will be the subject of combined hearings on February 7, 2018.

Important Hearing Procedure Note: The Commission will not take testimony on the “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 appeals raise a substantial issue. If the Commission takes testimony regarding whether the appeals raise 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. If the Commission finds that the appeals raise 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. (Title 14, California Code of Regulations (CCR) Sections 13115 and 13117.)

SUMMARY OF STAFF RECOMMENDATION

San Luis Obispo County approved two CDPs legalizing two previously illegally created parcels via the issuance of Conditional Certificates of Compliance (CCOCs). These two parcels were illegally subdivided by a deed conveyance in 1961, at a time when a plat¹ approval was required for such subdivisions under the Subdivision Map Act and County subdivision regulations. They thus enjoy no current legal status, and the County’s actions would legalize them. In other words, the County approved two CCOCs to authorize the properties to become separate legal parcels, fundamentally approving a subdivision. Such subdivision is development under the San Luis Obispo County LCP that requires a CDP.

The County-approved parcels and surrounding area are made up of a habitat mosaic of coastal dune scrub, maritime chaparral, and oak woodland that supports and includes habitat for sensitive species, including for the endangered Morro shoulderband snail and the threatened Morro manzanita. As such, the subdivision approval was appealed on contentions that the County’s actions are inconsistent with the LCP’s environmentally sensitive habitat area (ESHA) preservation and protection requirements. Specifically, the Appellants contend that the subdivisions are not a resource-dependent use as required by the LCP, and further that the LCP prohibits such subdivisions in ESHA unless certain findings are made, which was not done in this case. The Appellants further contend that the County’s actions are inconsistent with LCP policies regarding the adequacy of public services, specifically related to groundwater resources and the prioritization of those scarce resources for *existing* legal lots of record, not new ones.

The LCP requires the preservation and protection of ESHA, emphasizing protection of the entire ecological community over individual plants and animals. Use and development in these areas is limited to only those uses that are dependent on the ESHA resource, and only where such use

¹ A plat is a map, drawn to scale, showing the divisions of a piece of land.

and development does not result in significant disruption to ESHA. Moreover, subdivisions in ESHA are expressly prohibited in the LCP unless certain findings can be met. With respect to public services, the LCP includes a series of policies aimed at ensuring that adequate public services are available to support new development. This includes ensuring that essential resources, such as water supply and wastewater treatment capacity, are available to serve new development and that commitment of these resources to such development will not adversely affect coastal resources.

In this case, the County-approved project raises substantial LCP conformance issues. First, and based on site characteristics, a review of all the relevant file documents, and the Commission's Senior Staff Ecologist's site visit and memo, the entirety of both sites are occupied by ESHA. Because both projects are located entirely within ESHA, and since the LCP prohibits subdivisions that are entirely within ESHA, the project raises substantial LCP conformance issues. And second, the project raises issues with respect to adequacy of public services because of the limited water supply for existing development, let alone for future residences associated with two newly created residential parcels, in the community of Los Osos. The County did not adequately address these ESHA and water supply issues in its approval.

Staff therefore recommends that the Commission take jurisdiction over both CDP applications for these projects. Staff further recommends that the Commission, on de novo review, deny the CDPs.

On de novo review, the proposed parcels constitute a residential subdivision in ESHA which is not allowed by the LCP, including because residential subdivision is not a "resource dependent" use and because the LCP only allows for residential subdivision in ESHA where the building site can be properly cited outside of ESHA and its buffers. In this case, both sites are entirely ESHA, and thus it is not possible to provide a building envelope entirely outside of ESHA and ESHA buffers. Therefore, the proposed project is inconsistent with the LCP's ESHA policies, and must be denied. Further, the project would allow for the creation of new parcels even though the adequacy of groundwater resources to serve existing parcels cannot be demonstrated, including because of Los Osos' well known water supply inadequacies due to groundwater overdraft and nitrate contamination, which again violates the LCP. The projects must therefore be denied on these grounds as well.

In short, the projects propose to create two new parcels on land entirely comprised of ESHA and in a community with severe water supply inadequacies. The LCP does not allow such subdivisions due to these fundamental constraints. Thus, staff recommends that the Commission deny CDPs for the proposed residential subdivision projects. Because there are two projects, the Commission needs to take two separate actions. The motions to implement that staff recommendation are found on page 5 below.

TABLE OF CONTENTS

I. MOTIONS AND RESOLUTIONS.....	5
II. FINDINGS AND DECLARATIONS	6
A. PROJECT LOCATIONS	6
B. PROJECT DESCRIPTIONS	7
C. SAN LUIS OBISPO COUNTY APPROVAL AND APPEAL HISTORY	7
D. APPEAL PROCEDURES	8
E. SUMMARY OF APPEAL CONTENTIONS	8
F. SUBSTANTIAL ISSUE DETERMINATION	9
1. Applicable LCP Policies and Standards	9
G. COASTAL DEVELOPMENT PERMIT DETERMINATION	13
1. Environmentally Sensitive Habitat.....	13
2. Adequacy of Public Services.....	14
H. TAKINGS	15
I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)	16

APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – May 29, 2007 Coastal Commission staff comment letter

Exhibit 4 – County’s Notice of Final Local Action (Kolb)

Exhibit 5 – County’s Notice of Final Local Action (Cefalu)

Exhibit 6 – Appeal Contentions (Kolb)

Exhibit 7 – Appeal Contentions (Cefalu)

Exhibit 8 – Draft Habitat Conservation Plan Maps

Exhibit 9 – Memorandum from Coastal Commission Ecologist Dr. Laurie Koteen

Exhibit 10 – Applicable LCP Policies

I. MOTIONS AND RESOLUTIONS

A. Substantial Issue Determinations

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the CDP applications for the proposed projects under the jurisdiction of the Commission for a de novo hearing and action. To implement this recommendation, staff recommends a **NO** vote on each of the following motions. The Commission needs to make two motions to act on this recommendation, one for each appeal. Failure of these motions will result in a de novo hearing on the CDP applications, and adoption of the following resolutions and findings. Passage of these motions will result in a finding of No Substantial Issue on the two appeals and the local actions will become final and effective. The motions pass only by affirmative vote of a majority of the Commissioners present.

For A-3-SLO-09-032 (Kolb CCOC)

***Substantial Issue Motion #1:** I move that the Commission determine that Appeal Number A-3-SLO-09-032 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-09-032 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.*

For A-3-SLO-09-033 (Cefalu CCOC)

***Substantial Issue Motion #2:** I move that the Commission determine that Appeal Number A-3-SLO-09-033 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-09-033 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 Determinations

Staff recommends that the Commission, after public hearing, **deny** coastal development permits for the proposed developments. The Commission needs to make two motions to act on this recommendation, one for each CDP application. To implement this recommendation, staff recommends a **NO** vote on the following motions. Failure of these motions will result in denial of the CDPs as conditioned and adoption of the following resolutions and findings. The motions pass only by affirmative vote of a majority of the Commissioners present.

For A-3-SLO-09-032 (Kolb CCOC)

CDP Denial Motion #1: *I move that the Commission approve Coastal Development Permit Number A-3-SLO-09-032 pursuant to the staff recommendation, and I recommend a no vote.*

Resolution to Deny CDP: *The Commission hereby denies Coastal Development Permit Number A-3-SLO-09-032 on the grounds that the development will not be in conformity with the San Luis Obispo 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.*

For A-3-SLO-09-033 (Cefalu CCOC)

CDP Denial Motion #2: *I move that the Commission approve Coastal Development Permit Number A-3-SLO-09-033 pursuant to the staff recommendation, and I recommend a no vote.*

Resolution to Deny CDP: *The Commission hereby denies Coastal Development Permit Number A-3-SLO-09-033 on the grounds that the development will not be in conformity with the San Luis Obispo 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. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. PROJECT LOCATIONS

The two County-approved parcels are located on the south side of Bayview Heights Drive, approximately 920 feet (Cefalu parcel) and 1,133 feet (Kolb parcel) southeast of Covey Lane, in the community of Los Osos near the “back bay” (i.e., downcoast) portion of Morro Bay in the Estero Planning Area of San Luis Obispo County. Calle Cordoniz, an unmaintained dirt road that is closed to vehicular traffic, forms the southwestern boundary of the County-approved parcels. Central maritime chaparral entirely covers both properties. The maritime chaparral habitat is dominated by chamise, buckbrush, coastal sagebrush, black sage and bush monkeyflower, but also contains pygmy coast live oak trees and Morro Manzanita shrubs. This habitat type is a late successional stage of dune scrub vegetation, and components of both habitat types are present. West of the properties is an expanse of central maritime chaparral and central dune scrub habitats that cover several hundred acres between Highland Drive and the ridgeline to the south. The proposed properties are also located directly adjacent to the Morro Dunes Ecological Reserve² and are situated between that Reserve and the Los Osos Oaks State Natural Reserve.³

² The Morro Dunes Ecological Reserve is managed by the California Department of Fish and Wildlife for the protection of maritime chaparral and coastal dune habitat, which includes threatened and endangered species. The Reserve is part of a greenbelt corridor generally surrounding the Los Osos community, running south from Morro Bay State Park, along Los Osos Creek, to the Los Osos Oaks State Natural Preserve and then heading west, through

See **Exhibit 1** for project location maps and **Exhibit 2** for photos of the project sites (excerpted from a 2006 Biological Report for the Kolb parcel and identified in Appendix A).

B. PROJECT DESCRIPTIONS

The County-approved projects consist of legalizing two previously illegally created parcels via the issuance of Conditional Certificates of Compliance (CCOCs). These two parcels were illegally subdivided by a deed conveyance in 1961, at a time when a plat approval was required for such subdivisions under the Subdivision Map Act and County subdivision regulations. They thus enjoy no current legal status, and the County's actions would legalize them. In other words, the County approved two CCOCs to authorize the properties to become separate legal parcels, fundamentally approving a subdivision. Such subdivision is development under the San Luis Obispo County LCP, thus requiring a CDP. The Kolb parcel would be approximately 2.9 acres, and the Cefalu parcel would be approximately 1.99 acres.

C. SAN LUIS OBISPO COUNTY APPROVAL AND APPEAL HISTORY

On June 1, 2009, San Luis Obispo County approved CDP applications SUB2007-00054/C-07-0223 (Kolb) and SUB2007-00069/C-07-0254 (Cefalu), which authorized the legalization of both parcels via issuance of a CCOC.⁴ Notices of the County actions on the CDPs were received by the Central Coast District Office on June 22, 2009 (**Exhibits 4 and 5**). The Coastal Commission's ten-working-day appeal period began on June 23, 2009 and concluded at 5 p.m. on July 6, 2009. A valid appeal by Commissioners Wan and Shallenberger for each project was received on July 6, 2009 (**Exhibits 6 and 7**). At that time, the Applicants indicated to Commission staff that they were interested in looking into possibly selling or dedicating the land for conservation purposes, and they asked that the appeals be put on hold while they pursued such efforts. Thus, the appeals were placed in suspended status at the Applicants' request. Subsequently, when re-contacted more recently by Commission staff to see if the Applicants were still interested in pursuing the conservation purposes route, or whether the Applicants were

the Reserve to Montaña De Oro State Park, located along the coast. Within the greenbelt a variety of different habitat types can be found, including fresh and saltwater wetlands, riparian, coastal dune scrub and maritime chaparral. In the Irish Hills (i.e., the northern slope portion of the greenbelt where the subject properties are located), the primary habitat types are maritime chaparral and coastal dune scrub. These habitats support a wide range of wildlife species, including over 100 different bird species, 40 mammal species and 20 reptile species. Included within these species are a number of Federal and State threatened, endangered and special status species, including the Morro manzanita, Indian Knob mountain balm, Monterey spineflower, Peregrine falcon, Morro shoulderband snail, the black legless lizard and the coast horned lizard.

³ Los Osos Oaks State Natural Reserve features ancient sand dunes covered with centuries-old coast live oak trees. According to botanists, five major plant communities thrive within the Reserve: coastal sage scrub, central coastal scrub, dune oak scrub, coast live oak forest, and riparian (streamside). The oak communities exist close to each other, but each has its own character. The oak scrub has dwarf oak trees growing on the ancient (relict) sand dune. Though they are coast live oak trees, they rarely grow more than six to eight feet tall. The larger coast live oaks are located in areas of the Reserve where the soil is moister. These giants can grow to 25 feet in height. Their massive trunks and gnarled branches twist into all sorts of fantastic shapes.

⁴ Prior to the County's CDP action, on May 29, 2007, Commission staff submitted a letter to the County stating Commission staff's position that the proposed subdivisions were inconsistent with the County's LCP and recommending that the County deny the two projects (see **Exhibit 3**).

interested in still pursuing the subdivisions at all, the Applicants indicated that they still wanted to pursue the subdivisions and wanted to proceed to Commission hearings.

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 approvals of these projects are appealable because they are located seaward of the first through public road, and because subdivision is not the principally permitted use in the Residential Single Family land use category 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. 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. Because these projects are located between the nearest public road and the sea (or the shoreline of a body of water located within the coastal zone), this additional finding would need to be made if the Commission were to approve the projects following a de novo hearing.

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

E. SUMMARY OF APPEAL CONTENTIONS

The Appellants contend that the County-approved project is inconsistent with numerous San Luis Obispo County Local Coastal Program (LCP) policies and standards that protect environmentally sensitive habitat areas (ESHA). Specifically, the Appellants argue that the evidence before the

County indicated that the properties being divided consisted mostly of, if not entirely of, ESHA, and that establishing new parcels in ESHA is inconsistent with the LCP's ESHA protection policies and implementing ordinances (including LCP Environmentally Sensitive Habitats Policies 1, 2, 4, 29, 30, 35, 36, and Coastal Zone Land Use Ordinance (CZLUO) Sections 23.07.170-178). In addition, the Appellants contend that the proposed subdivision raises issues with the provision of adequate public services because the LCP requires that new development (particularly divisions of land) demonstrate that adequate public or private service capacities are available (including LCP Public Works Policy 1, 6, 8, South Bay Urban Area Planning Standard 2, and CZLUO Sections 23.04.021(c) and 23.04.430). The Appellants specifically contend that the County's approvals of the CCOCs were inconsistent with these LCP requirements because it has not been clearly established that there is an adequate water supply for existing legal lots of record in Los Osos, let alone newly created lots.

See **Exhibits 6 and 7** for a complete copy of the Appellants' contentions.

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." 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.

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

1. Applicable LCP Policies and Standards⁵

LCP Section 23.11.030 defines ESHA to include sensitive resource areas where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem. These ESHA areas include known wetlands, coastal streams and riparian vegetation, and unmapped terrestrial and marine habitats. This section also specifically identifies "other areas commonly known as habitat for species determined to be threatened, endangered, or

⁵ Among other LCP provisions, the Appellants cite South Bay Urban Area Planning Standard 2, which was in effect at the time the County acted on these CDP applications. Since that time, the LCP has been modified and that policy is no longer part of the LCP. Thus, the LCP in effect at the time the County acted on the CDPs is the standard of review for the substantial issue determinations, and that version, including South Bay Urban Area Planning Standard 2, applies to those determinations. The rest of the policies are the same between the LCP in effect when the County acted and the current certified LCP.

otherwise needing protection” as potential ESHA. LCP ESHA Policy 1 limits new development in ESHA to only resource dependent uses, while ESHA Policy 4 expressly prohibits land divisions in ESHA unless the buildable areas for the subdivision are entirely outside the minimum standard setback required for the habitat at issue. CZLUO Section 23.07.170 *et seq.* operates to implement these (and other) ESHA policies.

With respect to public services, and specifically water service, the LCP includes a series of policies aimed at ensuring that adequate public services are available to support new development. This includes ensuring that essential resources, such as water supply and wastewater treatment capacity, are available to serve new development and that commitment of these resources to development does not adversely affect coastal resources. Most relevant here, LCP Public Works Policy 1 requires that adequate public or private service capacity be available to serve new land divisions.

2. Analysis

ESHA

The Appellants contend that the County-approved project authorizes the creation of two new parcels in ESHA, and is inconsistent with the LCP’s ESHA protection policies and standards, including with respect to the criteria of CZLUO Section 23.07.170(c), which expressly prohibits subdivisions in ESHA.

The County-approved subdivisions are located on an approximately 5-acre undeveloped area that is made up of central maritime chaparral that supports and includes habitat for sensitive species, including for the federally endangered Morro shoulderband snail (MSS) and the federally threatened Morro manzanita. Because of this, per the LCP’s ESHA definition and related parameters, and consistent with environmental analyses of the sites, the entire property is ESHA.⁶ Specifically, for the Kolb parcel (roughly 2.9 acres), a prior applicant’s survey and biological reports⁷ indicated the site is substantially comprised of sensitive habitat, including for rare and threatened species. As stated in the reports:

- *The project site consists of one habitat, central maritime chaparral, in which 41 species of plants were identified. Surveys of the property were conducted from September 2005 through June 2006. Central maritime chaparral is listed as a sensitive natural community by the California Department of Fish and Game.*
- *Nine rare plants and six rare animals have the potential to occur on the property. Two rare plants, Morro manzanita and suffrutescent wallflower, were mapped on the property. All manzanita shrubs on the property were surveyed by Central Coast Engineering in January 2006 and overlaid on a topographic map of the property.*

⁶ Including the Commission’s ecologist Dr. Laurie Koteen, who concludes both project sites are ESHA (see findings on this point in the De Novo review section of this report beginning on page 12, as well as her memorandum in **Exhibit 9**).

⁷ On October 12, 2005, the Kolb parcel was transferred from Kolb to Schwarz and Warren who subsequently pursued developing the property with a SFD, including obtaining a Morro Shoulderband Snail Protocol Survey Report (March 2006) and a Biological Report (June 2006) for the site. These efforts appear to have been abandoned and the property was subsequently conveyed back to Kolb on July 5, 2007.

- *Protocol surveys for Morro shoulderband snail were conducted by Tenera Environmental in 2005 and 2006. Morro shoulderband snail was documented on the property.*
- *Coast live oak trees occur on the property. Oak tree canopy was surveyed and overlaid on a topographic map of the property in January 2006 by Central Coast Engineering.*
- *Biological resources that could be impacted by development of the home site and appurtenant structures include central maritime chaparral, Morro manzanita, sensitive reptile species, common animal and plant species, and nesting birds.*

Similarly, the CEQA documents prepared for both sites concluded that the project sites are within the range of MSS and Morro manzanita, and that development on the sites could impact the maritime chaparral and MSS and its habitat.

Thus, the entire property is ESHA, and per the LCP, only resource-dependent uses are allowed within ESHA. Subdivisions are not a resource-dependent use and are also expressly prohibited by the LCP in ESHA unless certain findings are made. The County did not attempt nor make any of these required findings. Accordingly, the County's approval raise a substantial LCP issue with respect to the projects' conformance with the LCP's ESHA protection policies.

Water Supply

With respect to public services, the Appellants also contend that the project is inconsistent with the LCP's requirement that new development (including divisions of land) demonstrate that adequate public or private service capacities are available.

The LCP provides a series of development restrictions aimed at ensuring that adequate public and private services are available to support efficient and orderly growth of the community. This includes ensuring that essential resources, such as water supply, are available to serve new development. See **Exhibit 10** for the complete text of applicable LCP policies. LCP priority is given to infilling within *existing* subdivided areas (LCP Public Works Policy 1, 6, 8, South Bay Urban Area Planning Standard 2, and CZLUO Sections 23.04.021(c) and 23.04.430). In this case, the County's approvals would create two new parcels via subdivision, and thus raise significant LCP conformance issues with these requirements because the County did not clearly establish that there is an adequate water supply for even existing legal lots of record in Los Osos, let alone new lots such as those approved by the County here. Indeed, it is well-known that the community of Los Osos suffers from severe public service constraints, including adequate water supply. Nor did the County's action establish that groundwater resources will be protected as required by the LCP. Finally, land divisions are not a priority use eligible to receive any of the limited capacity remaining in the groundwater basin. The County did not adequately address any of these water supply LCP requirements in its action, and it did not demonstrate that there would be adequate water to serve development on the created parcels. Thus, the County's approvals raise a substantial LCP water supply issue with respect to the adequacy of water, including in relation to attempting to accommodate additional residential lots within the Los Osos community consistent where there is scarce water supply, even for priority uses.

3. Substantial Issue Determination Conclusion

As explained above, the Commission in the past has considered whether the issues raised in a given 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 the County’s approval of these projects does raise substantial LCP conformance issues. Specifically, the entirety of the two project sites is located within ESHA, and the County-approved residential subdivision use and development is not resource-dependent, and subdivisions in ESHA are expressly prohibited. Therefore the approval is categorically inconsistent with the LCP on these ESHA points. Similarly, the County’s approval of these projects raises substantial LCP conformance issues with respect to adequacy of public services because it did not demonstrate that there would be adequate water to serve development on the created parcels.

Regarding the first factor, the County found the development consistent with applicable LCP ESHA policies even though subdivision is expressly prohibited by those policies absent specific findings, which the County did not address in these cases). Furthermore, in approving the subdivisions here the County did not consider the relevant policies regarding adequacy of public services to serve the proposed development, and did not demonstrate that there would be adequate water to serve development on the created parcels. Thus, there is simply minimal to no factual or legal support for the County’s decision.

Regarding the second factor, the extent and scope of the development as approved by the County, this too supports a finding of substantial issue because the subdivision would result in two new lots in ESHA located adjacent to two protected wildlife and habitat preserves, with which these properties seamlessly connect. As the subdivisions would affect approximately five acres of land by resulting in two entirely new lots of record in 100% ESHA, the extent and scope of the development is significant. This is particularly the case given the LCP prohibitions against development in ESHA, which is a high priority and a protected resource under the LCP

Regarding the third factor, the proposed project is located in an area where the County-approved parcels would facilitate potential development (such as houses) that would adversely affect significant coastal resources, including ESHA. As explained earlier, the project site implicates the same ESHA concerns as and is adjacent to other significant habitat areas including Morro Dunes Ecological Reserve and Los Osos Oaks State Natural Reserve. The project site and the related habitat mosaic in this area is a significant coastal resource of the highest regard. This factor too supports a finding of substantial issue.

Regarding the fourth factor, because the project raises such important coastal resource protection concerns for this particular community (ESHA, and the adequacy of public services/water) and the County approvals are do not demonstrate compliance with applicable LCP standards, a finding of no substantial issue would create a significantly adverse precedent for future interpretation of the LCP. Finally, regarding the fifth factor, the project raises issues of regional or statewide significance due to the threat to rare and endangered species and their habitat if the development were approved. ESHA, including ESHA such as in this case that provides for

endangered species habitat, is in finite supply, and actions taken under LCPs that result in a loss of ESHA and impacts to remaining ESHA are critical, and they demand thoughtful and stepwise evaluation to ensure that such ESHA impacts in any particular case are appropriate and allowed.

In short, the County-approved projects do not adequately address LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue. The Commission thus finds substantial issue on the appeals, and takes jurisdiction over the CDP applications for the two projects.

G. COASTAL DEVELOPMENT PERMIT DETERMINATION

The standard of review for this CDP determination is the San Luis Obispo County certified LCP and, because it is seaward of the first through public road and the sea, the Coastal Act's access and recreation policies. All Substantial Issue Determination findings above are incorporated herein by reference.

1. Environmentally Sensitive Habitat Areas

Applicable LCP Provisions

As described in the Substantial Issue portion of this report, the San Luis Obispo County LCP includes an extensive policy framework meant to protect the area's rich coastal resources, including through policies that protect ESHA. The LCP requires the preservation and protection of ESHA, and emphasizes protection of the entire ecological community over individual plants and/or animals (CZLUO Section 23.07.176). Only resource-dependent use and development is allowed within ESHA, and the LCP prohibits other types of development (like residential, commercial, and industrial development, including subdivision) within ESHA. Specifically, LCP ESHA Policy 1 states in relevant part: "Within an existing resource, only those uses dependent on such resources shall be allowed within the area." This resource dependency requirement is reiterated in CZLUO Section 23.07.170(e)(2) that states: "New development within the habitat shall be limited to those uses that are dependent upon the resource." Finally, the LCP expressly prohibits subdivision in ESHA unless all proposed building sites are located entirely outside of the applicable minimum setback required by CZLUO Sections 23.07.172 through 23.07.178. See **Exhibit 10** for applicable LCP provisions.

Analysis

As discussed in the Substantial Issue portion of the report, a series of reports associated with the project sites identify the subject properties and surrounding areas as potentially containing ESHA based on the habitats and species identified therein. Further, the Los Osos community is currently undergoing an LCP update, and draft documents identify the subject parcels as both ESHA and a "priority conservation area" (including pursuant to a required Habitat Conservation Plan (HCP) in process through the United States Fish and Wildlife Service (USFWS)) due to their location within the Los Osos greenbelt and adjacent to two protected State ecological reserves. See **Exhibit 8**.⁸ Finally, the Commission's Ecologist Dr. Laurie Koteen has reviewed all of these materials and has similarly concluded that both parcels are entirely ESHA:

⁸ Due to the outstanding issues in Los Osos, specifically lack of an approved communitywide Habitat Conservation Plan for Los Osos to deal with widespread environmentally sensitive habitat, a projected build-out in line with groundwater supply, and at that time (mid 2000's) uncertainty about a community-wide sewer system, the Los Osos portion of the Estero Area Plan update was withdrawn by the County in 2006. The Estero Area Plan was later

In sum, both lots resulting from the subdivision are entirely occupied by Coastal Dune Scrub and Central Maritime Chaparral, rare natural communities that also support rare plants and animals. Therefore, I find that both parcels are entirely occupied by ESHAs.

See **Exhibit 9**.

Accordingly, the proposed parcels cannot be found consistent with the LCP policies identified above because: 1) subdivision (including to facilitate future residential use and development) is not a resource dependent use; and 2) subdivision in ESHA is expressly prohibited unless findings are made that the entire future building footprint would be located outside of established ESHA and its buffers, findings for which cannot be made in this case due to the determination that both sites are entirely comprised of ESHA.

Conclusion

The proposed projects constitute residential subdivision in ESHA which is prohibited by the LCP. Therefore, the proposed projects are inconsistent with the LCP's ESHA policies, and must be denied.

2. Adequacy of Public Services

Applicable LCP Provisions

As discussed in the Substantial Issue portion of this report, the LCP includes a series of policies aimed at ensuring that adequate public services are available to support new development. This includes ensuring that essential resources, such as water supply and wastewater treatment capacity, are available to serve new development and that commitment of these resources to development does not adversely affect coastal resources. Specifically, the core LCP policy in this regard requires that new development (including divisions of land) demonstrate that adequate public or private service capacities are available. See Exhibit 10 for applicable LCP provisions.

Analysis

The LCP requires that new development (including divisions of land) demonstrate that adequate public or private service capacities are available. Priority is given to infilling within existing subdivided areas (LCP Public Works Policy 1, 6, 8, and CZLUO Sections 23.04.02i(c) and 23.04.430). In this case, the project proposes the creation/recognition of two new residential lots, and the Applicants have not demonstrated how such lots would be served with respect to water supply and wastewater treatment. With respect to water supply, water is scarce in Los Osos. With respect to wastewater, the site is outside of the current sewer service area, and no undeveloped properties are allowed sewer services unless and until the LCP's Los Osos Community Plan is updated to identify sustainable community buildout, and infill associated

certified by the Coastal Commission in 2009 with updates to the parts dealing with Cayucos and the rural areas, but without any updates for the Los Osos urban area. These updates are currently underway as part of the Los Osos Community Plan, which includes the aforementioned USFWS HCP process, including to address ESHA issues in Los Osos.

with that buildout is accounted for in an HCP, and all of that is certified by the Commission.⁹ In short, the project cannot be served by adequate and sustainable services, and thus it is inconsistent with LCP provisions requiring a finding that there is an adequate water supply, including as such policies are directed to *first* identifying such a supply for existing legal lots of record within the existing urban community, let alone for future new residences on newly created residential lots on its outskirts. Rather, it is well known that the community of Los Osos suffers from severe public service constraints, including specifically water supply, due to groundwater overdraft and nitrate contamination in the upper aquifer. Finally, the land divisions are not a priority use eligible to receive any of the limited capacity remaining in the groundwater basin.

Conclusion

In addition to their fatal LCP consistencies related to the LCP's ESHA protection requirements (as detailed above), the proposed subdivisions also cannot demonstrate that they would be able to be served by adequate services, and the projects must be denied on this basis as well.

H. TAKINGS

In addition to evaluating the proposed development for consistency with the certified LCP, considering that staff is recommending denial of the proposed project, 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:

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

⁹ Pursuant to the Commission's approval of the CDP for the Los Osos Wastewater Project in 2010 (CDP A-3-SLO-09-055/069). Specially, Special Condition 6 states: "Wastewater service to undeveloped properties within the service area shall be prohibited unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats."

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 inconsistencies while still allowing some reasonable amount of development.

Here, although the current proposed subdivisions are recommended for denial, the Commission concludes that any takings claim made with respect to denial of the projects would be premature. This is so because, as explained previously in this report, the action in 1961 which attempted to create the subject lots from a larger parent parcel was done so illegally because the subdivider did not obtain a plat map for the subdivision as required at that time under the Subdivision Map Act and the County's local subdivision ordinance. Thus, the subdivision which created the subject lots has been illegal for numerous decades, and subsequent parties partaking in transactions involving these illegally subdivided lots did so at their own risk and any extensive transactional history regarding the subject lots does not thereby impart legal status on that unlawful subdivision.

The County recognized the illegality of the 1961 subdivisions, but ultimately approved the parcels through its CCOC/CDP process, which approval has been appealed to the Commission. However, as explained previously in this report, a CDP cannot be issued for the proposed subdivisions due to inconsistency with LCP policies regarding ESHA and adequacy of public services. Thus, the proposed project sites enjoy no legal status and the Commission recognizes as the legal lot of record the parent parcel *before* the 1961 subdivision. In light of the unlawful subdivision history for the subject lots (which could have been determined with due diligence), the Applicants have no *reasonable*, investment-backed expectation to legalization of the subdivided lots considering Coastal Act considerations which apply to current legalization of the unlawfully subdivided lots.

Considering that the parent parcel pre-1961 subdivision is the legal lot of record for purposes of considering any development proposal under the LCP, any takings consideration here is premature because a development proposal regarding the pre-1961 subdivided parent parcel is *not* in front of the Commission. If and when such a CDP application is submitted (to the County in the first instance), then the County can determine the minimum amount of development appropriate on the parent parcel to avoid an unconstitutional taking of private property, if applicable. Without limiting the scope of any potential development proposal, any future CDP application for the parent parcel could hypothetically involve a different subdivision consistent with LCP requirements or with a conservation easement component (where the economic benefit could derive from its value as an acquisition site under a habitat conservation plan, for example). On that point, it is also worth noting that the parent parcel already contains a single-family residence so presumably already enjoys an economic benefit. Thus, in this instance, the Commission concludes that its action here in denying CDPs for the proposed parcels will not result in an unlawful taking of private property.

I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

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

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

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

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

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 projects. All above findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed projects would have significant adverse effects on the environment as that term is understood in a CEQA context.

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

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- Morro Shoulderband Snail Protocol Survey Report, Tenera Environmental, March 3, 2006.
- Biological Report for 1029 Bayview Heights Drive, Althouse and Meade, Inc. Biological and Environmental Services, June 2006.
- Negative Declaration & Notice of Determination (Kolb) dated April 23, 2009.
- Negative Declaration & Notice of Determination (Cefalu) dated April 23, 2009.

APPENDIX B – STAFF CONTACTS WITH AGENCIES AND GROUPS

- Applicants’ Representative (Kathy Novak)
- San Luis Obispo County Planning and Building Department