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# W20c

Appeal Filed: 12/12/2017  
49<sup>th</sup> Day: 2/23/2018  
Staff: Brian O'Neill - SC  
Staff Report: 1/19/2018  
Hearing Date: 2/7/2018

## APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION

**Application Number:** A-3-MCO-17-0068

**Applicant:** Monterey Bay Aquarium Research Institute (MBARI)

**Appellants:** Commissioners Howell and Peskin

**Local Government:** Monterey County

**Local Decision:** Monterey County Coastal Development Permit Application Number PLN120553, approved by the Monterey County Planning Commission on October 25, 2017.

**Project Location:** 7500 Sandholdt Road, Moss Landing, North Monterey County (APN 133-252-001-000)

**Project Description:** Construct an approximately 5,200-square-foot, 30-foot-tall galvanized metal storage building and a 500-foot-long concrete retaining wall; install a six-foot-tall chain link perimeter fence and over 38,000 square feet of pavement (to provide 32 parking spaces and a storage area for 18 shipping containers); and perform over 3,000 cubic yards of grading, all within the coastal dunes adjacent to Salinas River State Beach and Moss Landing Harbor.

**Staff Recommendation:** Substantial Issue Exists

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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. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which the Commission will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

## SUMMARY OF STAFF RECOMMENDATION

Monterey County approved a coastal development permit (CDP) authorizing the construction of an approximately 5,200-square-foot and 30-foot tall storage structure, 38,680 square feet of pavement, a four-foot-tall, 500-foot-long concrete retaining wall, installation of a six-foot-tall chain link perimeter fence and approximately 3,152 cubic yards of grading. The project is located on a roughly three-acre parcel within the Moss Landing community of North Monterey County. The site is near the end of the sandspit that ends at the Moss Landing Harbor jetties and is situated between Salinas River State Beach to the west and Moss Landing Harbor to the east. The project would cover approximately 1.7 acres (or over one-half of the dunes that make up the roughly three-acre site) with pavement and other development. The County identified the remaining dunes that would not be covered on the site as an environmentally sensitive habitat area (ESHA) that would be placed into a scenic and conservation easement.

The appeal contends that the County’s approval raises issues of consistency with Monterey County Local Coastal Program (LCP) policies and implementing standards related to ESHA, coastal hazards and shoreline armoring, visual resources, and public access.

With regard to ESHA, the LCP identifies coastal dunes as ESHA within which only resource-dependent uses are allowed, and only when the resource itself is not disrupted and adequate protections and mitigations are applied. The County-approved project results in significant non-resource-dependent development in an area that appears to be coastal dune ESHA, which is prohibited by the LCP. In approving the project, the County took the position that not all of the site is dune ESHA, including based on past degradation and disturbance. However, the dunes in question, albeit degraded in places, appear to be ESHA (including as evaluated by the Commission’s Ecologist, Dr. Lauren Garske), and the gravel and storage containers on the site appear to be unpermitted (and neither the County nor the Applicant has provided evidence that the placement of gravel or storage containers on the dunes at this location has ever been legally coastal permitted).<sup>1</sup> In such cases the LCP requires that the site be evaluated in a pre-violation

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<sup>1</sup> A small (about 160 square feet and 11 feet in height) data-collection shed on the site is permitted (County CDP PLN050542), as well as an underground cable (CDP PLN130590) connected to offshore monitoring equipment; this cable also connects to equipment in the data-collection shed.

and undisturbed state. The County's approval appears to be inconsistent with, and at the very least raises a substantial issue with respect to, the LCP's ESHA protection provisions.

With regard to coastal hazards and shoreline armoring, the LCP requires that development be sited and designed to avoid hazardous areas, only allows armoring in limited situations (such as when required to protect "existing significant structures"), and does not allow armoring to protect new development such as this. The County-approved project includes a 500-foot long concrete retaining wall structure along the entire western and northern sides of the project site (which may function here as a seawall). Despite the LCP requirement that all coastal hazards must be analyzed and that all development must be sited and designed to minimize risks from coastal hazards and avoid the use of shoreline armoring, the County's staff report did not analyze or mention coastal erosion, wave run-up, sea level rise, or armoring at the site at all, inconsistent with the LCP, and the only such assessment was limited solely to potential tsunami impacts. Consequently, proposed development, including the concrete retaining wall structure, was not appropriately analyzed in this respect, and the County's approval appears inconsistent with, and at the very least raises a substantial issue with respect to, the LCP's coastal hazards and shoreline armoring provisions.

With regard to visual resources, the LCP specifically protects coastal dune and beach viewsheds, and requires all development to "be designed and sited to be unobtrusive and compatible with the visual character of the area," among other things. In this case, the project site is located in a very scenic location on and near coastal dunes and the public State Beach. The County-approved project includes significant new development that would block and otherwise impair coastal views, including the 30-foot tall storage building and related development (e.g., paving, fencing, storage containers, etc.), none of which appear to meet LCP tests, including with respect to requiring allowable development to be sited and designed to be low-lying and small-scale in a way that maintains natural topography and blends in with the character of the area and the environment. The County's approval raises questions of substantial consistency with the LCP's visual protection provisions.

With regard to public access, both the Coastal Act and the LCP protect existing access, and require access be provided specifically at this Moss Landing location. The project site is located directly between Salinas River State Beach and Moss Landing Harbor, which are extremely popular visitor destinations. The County-approved project does not include any pathways or boardwalks to the shoreline or any other public access amenities, but rather blocks this area from the public via chain-link fence. The County's approval raises questions of substantial consistency with the public access and recreation policies of the LCP and the Coastal Act.

In short, the County-approved project raises questions regarding its consistency with Coastal Act and LCP public access requirements, as well as with the LCP's ESHA, coastal hazards and shoreline armoring, public view, and related requirements, and staff recommends that the Commission find substantial issue and take jurisdiction over the CDP application for this project. If the Commission does so, then the de novo hearing on the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution to affect this recommendation are found on page 5.

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### APPENDICES

Appendix A – Substantive File Documents

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### EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3a – Visual Simulation

Exhibit 3b – Approved Project Plans

Exhibit 3c – County’s Conditions of Approval

Exhibit 4 – County’s Final Local Action Notice

Exhibit 5 – Appeal Contentions

Exhibit 6 – Historical Photos of Project Site

Exhibit 7 – Applicable LCP and Coastal Act Provisions

### CORRESPONDENCE

## I. MOTION AND RESOLUTION

### Substantial Issue Determination

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

***Motion:** I move that the Commission determine that Appeal Number A-3-MCO-17-0068 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and I recommend a no vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-MCO-17-0068 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Monterey County Local Coastal Program.*

## II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

### A. PROJECT LOCATION

The proposed project is located on a roughly three-acre coastal dune parcel within the Moss Landing community in North Monterey County at 7500 Sandholdt Road. The parcel is located at the tip of the Moss Landing sandspit where it meets the Moss Landing Harbor jetty, located between Salinas River State Beach and the Pacific Ocean to the west and Moss Landing Harbor and Highway 1 to the east. Portions of the overall larger sandspit area have previously been developed in years past with a public parking lot, a public road (Sandholdt Road), a research building and associated facilities, boat repair shops, boat launch facilities, a restaurant and fish market, and related Harbor development, almost all of which pre-dates the Coastal Act and is located to the south of this site. Much of the undeveloped portions of the Moss Landing sandspit contain coastal dune habitat and public beach, particularly those portions of it, like this site, that are located to the north. This particular project site was used at one time in the past as an informal area for dry boat storage, but it is no longer used in that way. The site is mostly undeveloped sand dunes, but it also includes a small storage shed, a perimeter chain-link fence, a graveled area, and several shipping containers. Photographic evidence indicates that the gravel parking area appears to have been installed between 1993 and 2002. Neither the County nor the Applicant has provided evidence that such development ever received the necessary coastal permits, and the Commission's records show no history of any CDPs for such development. Absent CDPs that would authorize it, such development would be considered unpermitted, and the analytic baseline for considering the proposed project is an undeveloped coastal dune site.

See **Exhibit 1** for project location maps and **Exhibit 2** for photos of the project site. See **Exhibit 6** for historical photographs of the project site.

## **B. MONTEREY COUNTY APPROVED PROJECT**

The Monterey County Planning Commission approved a CDP for the project on October 25, 2017 (County CDP Number PLN120553). The County's approval authorized the construction of an approximately 5,200-square-foot, 30-foot-tall galvanized metal storage structure. The project also includes a four-foot-tall, 500-foot-long concrete retaining wall along the entire western and northern project boundaries, as well as a six-foot-tall chain link security fence around the entire perimeter of the parcel. The project includes installation of 38,680 square feet of pavement to accommodate 32 parking spaces and 18 storage containers. The project would require approximately 3,152 cubic yards of grading (1,477 cubic yards of cut and 1,675 cubic yards of fill). The project would cover approximately 1.7 acres of the three-acre site with pavement and structures, and the remaining 1.3 acres would be placed into a scenic and conservation easement. The project also includes mitigation measures to protect County-identified dune habitat adjacent to the site during construction, including the use of temporary exclusionary fencing and shoring of cut slopes when excavation occurs within five feet of County-identified dune ESHA. See **Exhibits 3b** for the approved project plans and **Exhibit 3c** for the County's conditions of approval.

## **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 a CDP for this project is appealable because the proposed development is located between the sea and the first public road and within 300 feet of a beach.

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 consider a CDP for an appealed project de novo unless a majority of the Commissioners present finds that "no substantial issue" is raised by such allegations. Under Section 30604(b), if the Commission conducts the de novo portion of an appeal hearing (upon making a determination of "substantial issue") and finds that the proposed development is in conformity with the certified LCP, the Commission must issue a CDP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also

requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is located between the nearest public road and the sea (or the shoreline of a body of water located within the coastal zone), and thus this additional finding would need to be made if the Commission were to approve the project following a de novo hearing.

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 their 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. MONTEREY COUNTY APPROVAL**

On October 25, 2017, the Monterey County Planning Commission approved a CDP (CDP PLN120553) for the project. Notice of the County's action on the CDP was received in the Coastal Commission's Central Coast District Office on November 29, 2017 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on November 30, 2017 and concluded at 5 p.m. on December 13, 2017. One valid appeal was received during the appeal period (see **Exhibit 5**).

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

The appeal contends that the County's approval raises issues of consistency with Monterey County LCP policies and implementing standards related to ESHA, coastal hazards and shoreline armoring, visual resources, and public access, including with respect to LCP provisions that prohibit development in ESHA (including LCP Policy 2.3.2.1); that prohibit shoreline armoring for new development such as this (including LCP Policy 2.4.2.1); that require development in high hazard areas to prepare appropriate reports that address coastal hazards (including LCP Policy 5.2.1.A.1); that protect scenic coastal and dune resources and public views (including LCP Policy 2.2.2.2); and that require development to maximize and enhance public access (including LCP Policy 5.6.3.7(b), and Coastal Act Sections 30210-30224, which also apply in this case with respect to public access). See **Exhibit 5** for the full appeal text, and see **Exhibit 7** for the text of the above-cited LCP and Coastal Act provisions.

#### **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" (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 CDP decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

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

## **1. Environmentally Sensitive Habitat Areas (ESHA)**

### *Applicable LCP Provisions*

The Monterey County LCP is divided into four segments,<sup>2</sup> each with its own LUP and Implementation Plan (IP). The subject property is located within the North County LCP segment. The North County LCP includes various policies meant to protect the area's diverse and valuable natural resources, including sensitive coastal dune areas. The key LCP policy states that the "environmentally sensitive habitats of North County are unique, limited, and fragile resources of statewide significance, important to the enrichment of present and future generations of county residents and visitors; accordingly, they shall be protected, maintained, and, where possible, enhanced and restored" (LCP Policy 2.3.1). The LCP defines ESHA as "an area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and development" (IP Section 20.06.440), and categorically identifies coastal dunes as ESHA (LCP Policy 2.3.2.1). Specifically, LCP Policy 2.3.2.1 recognizes that coastal dunes categorically constitute ESHA and that, with the exception of resource-dependent uses, "all development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall be prohibited." LCP Policy 4.3.6.F.4 states that a "basic standard for all new or expanded industrial uses is the protection of North County's natural resources" and that "[n]ew or expanded industrial facilities shall be sited to avoid impacts to agriculture or environmentally sensitive habitats." See the full text of these LCP provisions in **Exhibit 7**.

Where development is located within 100 feet of ESHA, the LCP also has strict guidelines to ensure that such development does not impact habitat values, stating that the County "shall restrict the removal of indigenous vegetation and land disturbance (grading, excavation, paving, etc.) to the minimum amount necessary for structural improvements (LCP Policy 2.3.2.8); shall "incorporate all site planning and design features needed to prevent habitat impacts (LCP Policy 2.3.2.2); and projects "shall be modified for siting, location, bulk, size, design, grading, vegetation removal, and/or other methods where such modifications will reduce impacts to an insignificant level" (IP Section 20.144.040.B.2).

Overall, these LUP policies and IP sections are meant to ensure that development within ESHA is limited to the minimum necessary to support resource-dependent uses and, where development occurs adjacent to ESHA, the development is reduced as necessary to avoid impacts to such habitat. See **Exhibit 7** for the text of the cited LCP provisions.

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



### *Analysis*

The appeal contends that the County-approved project appears to be inconsistent with these aforementioned LCP ESHA LUP policies and IP sections. Specifically, the County allowed significant non-resource-dependent development within a coastal dune area that appears to be ESHA when the LCP does not allow such development in such an area; the County did not include any type of setback or related project modifications to protect habitat in the LCP-required 100-foot area adjacent to even the County-identified ESHA; nor did the County include any offsetting mitigations for ESHA impacts. The project includes significant development (i.e., a 5,200-square-foot structure, 38,680 square feet of pavement, 1,477 cubic yards of cut, 1,675 cubic yards of fill, chain link fencing, and a 500-foot-long retaining wall) within coastal dune areas. The development would be used as a parking lot and storage facility, which is not a resource-dependent development and use. Because LCP Policy 2.3.2.1 prohibits all non-resource-dependent development within dune ESHA and the project is not resource-dependent, the project would be prohibited by the LCP if the site is dune ESHA.

On this critical point, the County did find that dune ESHA is present on the project site, but the County found that the approved development envelope is located *outside* of such County-identified ESHA, and found that not all of the site is dune ESHA. The County derived these conclusions in part based on an argument that the approved development envelope is located in a degraded dune area that includes a mixture of ruderal and native vegetation and that does not include any rare or endangered dune plant or animal species. However, the LCP definition of ESHA is not limited solely to areas for which rare or endangered species have been positively identified; rather ESHA also includes *habitat areas that support* rare or especially valuable plant and animal life. As a result, the lack of such individual rare plant or animal species, if accurate, is not dispositive for ESHA under the LCP.

In other words, as discussed previously, IP Section 2.3.2.1 already ***categorically*** deems coastal dune habitat in Northern Monterey County to be ESHA. The County does not dispute that the project site constitutes coastal dune habitat. Caselaw is clear that “[Coastal Act] section 30240 [and thus, LCP policies based on Section 30240] does not permit its restrictions to be ignored based on the threatened or deteriorating condition of a particular ESHA.” (*Bolsa Chica Land Trust v. Sup. Ct.* (1999) 83 Cal.Rptr.2d 850, 858.) Therefore, “in deciding whether a particular area is an ESHA within the meaning of section 30107.5 [and thus, LCP policies based on 30240], [the] Commission may consider, among other matters, its viability.” (*Id.*) Thus, even if the County has not identified the dunes onsite as ESHA due to its deteriorated condition, its ***viability*** to provide rare or especially valuable plant or animal life or their habitats may still render the dunes ESHA.

In addition, the Commission has consistently found that coastal dunes, even when disturbed or degraded, do constitute ESHA if the area displays certain dune traits, such as an occurrence of plant species normally associated with dunes, substrate that displays dune characteristics, or dune morphology.<sup>3</sup> In fact, the Commission has a long history of protecting coastal dune ESHA,

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<sup>3</sup> The Commission has consistently and repeatedly found that even degraded dunes constitutes ESHA, including in nearby cases in Monterey’s Del Monte Dunes area (e.g., CDPs 3-93-62 (Sewald), 3-93-63 (Boyden), 3-93-28 (Bram), 3-01-01 (Del Monte Beach Re-Subdivision)) and in the Asilomar Dunes (e.g., CDPs 3-14-1186 (Griffith), 3-14-1591 (Grines), 3-14-1172 (White), 3-16-0350 (St. Dennis)), and recently in nearby Fort Ord and Marina

including degraded dunes, and has found that degraded dunes can be restored to high quality fully functioning dune habitat, thus facilitating the presence of rare or especially valuable plant or animal life or their habitats which renders coastal dunes ESHA and which would be present if the dunes had not been degraded. And finally, the LCP categorically calls out dunes as ESHA (LUP Policy 2.3.2.1), and thus whether a dune is degraded or pristine is immaterial under the LCP, and all such dune areas are ESHA under the LCP. The Commission's staff ecologists have reviewed the biological report prepared for the project and photographs of the site, and conducted a preliminary site visit (i.e. viewed the development site from outside the existing fencing). This information shows that dune vegetation continues to persist in disturbed areas and portions of the site that were not identified as ESHA by the County still display dune form (see **Exhibit 2** for photographs of the project site). Based upon these observations, Commission Ecologist Dr. Lauren Garske believes that it is almost certain that dune ESHA is present within the County-approved development envelope.

The County also made its non-ESHA argument for a portion of the approved development envelope that includes gravel, some storage containers, and fencing. However, photographic evidence indicates that the gravel, storage containers, and fencing were installed sometime between 1993 and 2002 without the benefit of a CDP (see **Exhibit 6** for historical photographs of the site). Neither the County nor the Applicant has provided evidence that such development on the site was approved by a CDP, and the Commission's records show no history of a CDP for such development.<sup>4</sup> Absent CDPs that would authorize it, such development would be considered unpermitted, and the analytic baseline for considering the proposed project would be an undeveloped coastal dune site. In fact, IP Section 20.90.130 requires that such violations be resolved as a pre-condition to even considering CDP applications, and also requires the restoration of land prior to a CDP application being deemed complete (see **Exhibit 7**). Had the County required the unpermitted development to be removed, as required by the LCP, and the land restored to its pre-violation state, or had the unpermitted development not have occurred at all, the project site would be all undeveloped dune with no structures or other development on it.<sup>5</sup>

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cases (CDP 3-14-1613 (Fort Ord Dunes State Park Campground) and Cease and Desist Order CCC-17-CD-02 (CEMEX Sand Mining)).

<sup>4</sup> Various permits have been approved for development on the site over the years, including County CDPs for the construction of a 160-square-foot, 11-foot-tall data collection shed (CDP PLN050542) and installation of an underground cable (CDP PLN130590) that connects to offshore monitoring equipment and also connects to equipment in the data-collection shed. The County also approved the temporary use of the project site for construction parking related to development at 7502 Sandholdt Road (CDP PLN010235). However, no structures or other development were allowed under that permit and a condition of approval of that CDP required restoration of the site after two years. None of the related permits allowed for the placement of gravel or permanent use of the site for storage containers. Subsequent to the County's 2017 CDP approval and this appeal, the Applicant submitted a February 2000 letter stating that a Monterey County grading inspector had concluded, after-the-fact, that the placement of gravel was considered maintenance that did not require a grading permit. However, even if accurate, it is immaterial whether a grading permit was required. The placement of gravel constitutes development under the LCP that requires a CDP, and there is no CDP for the gravel. Thus the only permitted development on the site is a 160-square-foot data collection shed and underground cable.

<sup>5</sup> When unpermitted development has altered the current situation, in order to fairly evaluate the impacts of proposed development, the Commission compares the proposed condition to the condition that would exist now were the unpermitted development not to have occurred (*LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770, 797 ("to enable the Commission to protect coastal resources, and to avoid condoning

Moreover, even if the County's ESHA analysis were accurate and the approved development is not located directly *within* ESHA, the County did identify dune ESHA on all areas of the site directly adjacent to the development envelope. In other words, the portion of the site where the Applicant proposed development (plus a five-foot-wide sandy area next to it) was deemed not to be ESHA, but all of the surrounding areas were deemed to be ESHA. Significant development, including grading, installation of pavement, and construction of retaining walls, will directly abut (i.e., within five feet) the County-identified dune ESHA. The LCP requires projects to be modified for siting, location, bulk, size, design, and grading to prevent any habitat impacts. The County failed to modify the scope of the project and allows permanent development to occur within five feet of County-identified ESHA. Typically, a buffer of 100 feet is appropriate to fully protect dune ESHA, and the LCP explicitly requires this 100-foot area to be evaluated and appropriate measures applied in it to protect ESHA, none of which occurred in this case. Furthermore, it is not clear how a five-foot setback would be adequate to prevent habitat impacts (e.g., due to trampling, debris, noise, light) and meet LCP requirements in this regard. Additionally, the County's approval appears to allow grading to occur closer than five feet from identified ESHA and only requires the shoring of cut slopes when excavation activities occur within five feet of County-identified ESHA. The only other mitigation measure required to protect ESHA is the use of temporary exclusionary fencing during construction. No modifications or reductions in project scope were made to reduce the project's habitat impacts as required by the LCP. Although the approval does require the areas of County-identified ESHA to be placed into conservation easement, the approval does not specifically provide for the restoration or maintenance of dune habitat or offsetting dune restoration or any other dune mitigations at all.

In sum, the County approved significant non-resource-dependent development within a dune area that appears to be ESHA, which would be inconsistent with LCP ESHA requirements. The County's arguments that the development can be allowed because this area is either degraded dune or dune that is occupied by gravel and storage containers and thus not ESHA disregards the fact that the LCP categorically calls out dunes, even degraded dunes, as ESHA, disregards the Commission's consistent treatment of even degraded dunes as ESHA, disregards that the Coastal Act still protects degraded but viable ESHA as appears to be the case here, and disregards that the gravel and related development on the site appears to be unpermitted (with the logical implication that *pre*-development conditions should be evaluated as the environmental baseline for purposes of the proposed project). The LCP requires that the unpermitted development be removed and the site be restored to its pre-violation state as a precondition of even considering a CDP application. The County's approval also provides no meaningful setback from adjacent ESHA areas, and no mitigation for ESHA impacts otherwise. Thus the County's approval of the project raises a substantial issue of conformity with the LCP's ESHA protection provisions.

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unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred"). Stated differently, unpermitted development does not form the baseline from which impacts are assessed.

## 2. Coastal Armoring and Hazards

### *Applicable LCP Provisions*

The North County LCP emphasizes the use of best planning practices for areas subject to coastal hazards and encourages careful planning that respects the dynamic coastal environment. LCP Policy 2.4.2.1 discourages the alteration of natural shoreline processes, including in terms of drainage, erosion, water circulation, and sand transport. Limited shoreline alteration, such as shoreline protection devices such as seawalls, is allowed for the “protection of public beaches, existing significant structures, coastal-dependent development, and the public health and safety.” Shoreline protection devices are not allowed to protect new development such as the proposed project under the LCP, which does not qualify as any category of development afforded protection by a shoreline protective device under LCP Policy 2.4.2.1. In addition, IP Section 20.144.060.C.1 requires the preparation of complete professional engineering reports where project impacts on shoreline processes are not fully known.

LCP Policy 2.8.2.1 further requires development to “be sited and designed to minimize risk from geologic, flood, tsunami or fire hazards” and also requires that “[a]reas of a parcel which are subject to high hazard(s) shall generally be considered unsuitable for development.” That policy further requires proposed development in high hazard areas to be supported by a complete geotechnical report designed to describe applicable hazards and conditions, and the ways in which the project intends to address such hazards consistent with the LCP. The project is located in an LCP defined high hazard area. See **Exhibit 7** for the text of the cited LCP provisions.

### *Analysis*

The appeal contends that the County-approved project includes a 500-foot-long concrete retaining wall structure along the entire western and northern sides of the project site that appears to be acting as a seawall, but that the County did not adequately analyze whether this structure would function as a shoreline protection device and, if so, whether shoreline armoring for this project is even allowed by the LCP. Further, despite the LCP requirement that impacts to shoreline processes and all coastal hazards must be studied for proposed development located in hazardous shoreline areas such as this, the County did not analyze the breadth of issues applicable, and the project did not include any of the required LCP reports, such as those that would provide an analysis of the impacts of coastal erosion, wave run-up, and sea level rise to the site over time. The County instead limited its review of coastal hazards to potential tsunami impacts at the site. See **Exhibit 3b** for the approved project plans.

The Applicant claims that the 500-foot retaining wall structure was not specifically designed to serve as a shoreline protection device, and thus LCP limits on shoreline protective devices do not apply to this project. However, the wall is located along the shoreline interface in a manner that appears designed to address coastal hazards emanating from the ocean, and is expected to have essentially the same impacts as a seawall. In fact, the concrete wall will be placed directly into dunes and function as protection for the inland development associated with the project, and it will alter the natural shoreline and its processes, including in terms of erosion and sand transport. Additionally, the entire project site is located on a sandspit between the Pacific Ocean and the Harbor that is recognized in the County’s LCP as a high hazard area. It appears as though the concrete wall will function as a shoreline protective device, regardless of whether the Applicant designates it as so or not. If it does in fact constitute a shoreline protective device by virtue of its

function and attendant impacts, it is not allowed by the LCP for a storage and parking project such as this.

The County did not identify the concrete wall as a shoreline protective device and thus did not analyze the impacts that the wall structure may have on the natural shoreline, nor did the County establish whether armoring for this project is allowed at all. Like the Coastal Act, the LCP prohibits the construction of shoreline armoring except when required to protect certain existing structures, public beaches, and coastal-dependent development. The County did find that the Applicant participates in coastal-dependent research generally speaking as part of MBARI's overall mission, but did not evaluate how this proposed project might affect shoreline armoring consistency under the LCP, including any kind of evidence that this particular project includes coastal-dependent development that requires a location adjacent to the sea. On the contrary, the County-approved project includes paving for 32 parking spaces, space for 18 storage containers, and construction of a metal storage building. There is no evidence in the record to indicate that such storage and parking uses require a location adjacent to the sea. Rather, the County staff report notes that all of the equipment to be stored at this location is currently stored at other locations. The purpose of the project is to "consolidate current field staging" to provide "a more effective operational plan," but it is not clear that the project includes elements that *require* a location adjacent to the sea. Moreover, the LCP only allows shoreline armoring when it is *required*, or necessary, to protect coastal-dependent development. Because the County's staff report did not identify the concrete seawall as a shoreline protection device, the County did not analyze whether the wall will function as a shoreline protection device and, if so, whether there is a need for such armoring, whether such armoring is allowed for this development, or whether there are any alternatives that would avoid the need for such armoring. Thus, because the project does not appear to constitute coastal-dependent development, and even if it were there is no evidence to suggest that shoreline armoring is required to protect it, the LCP prohibits the construction of shoreline armoring for the project.

Moreover, because the County did not identify the concrete wall as a shoreline armoring device, the Applicant did not prepare the required reports designed to help understand the wall's impact on natural shoreline processes. The wall is located directly adjacent to a popular public beach in a dynamic dune environment that is subject to significant erosion and sand transport. In addition to habitat concerns, shoreline armoring in such locations can have significant impacts to sand supply and public access. Because the impacts of the wall were not analyzed, the impacts of the approved wall on the beach environment and public access were neither identified nor mitigated.

Additionally, despite the LCP requirement that all coastal hazards must be addressed and all development must be sited and designed to minimize risks from coastal hazards, the project was also lacking the LCP-required supporting hazards report and evaluation at all. And the County's staff report limited its hazards analysis to potential tsunami impacts. As a result, the LCP-required analysis related to coastal hazards (such as issues related to stability, erosion, ocean storms, flooding, and sea level rise) was missing. The approval therefore raises significant questions as to whether the project was sited and designed to minimize risks from such hazards, and it was approved without the required assessment and evaluation of coastal hazard impacts altogether.

In sum, the project includes a concrete retaining wall that appears to function as and may have the associated impacts of a shoreline protection device, which the LCP would only allow to protect existing development or coastal-dependent development, neither of which is the case here. Furthermore, the County's approval did not properly analyze the impacts of the project on natural shoreline processes or the potential risks from coastal hazards. Thus the County's approval of the project raises a substantial issue of conformity with the LCP's shoreline armoring and coastal hazards provisions.

### 3. Visual Resources

#### *Applicable LCP Provisions*

The LCP stresses the importance of protecting public views in North County, including providing explicit protection for coastal dune and beach viewsheds such as that associated with the subject site. In fact, the key LCP views policy states that "development should be prohibited to the fullest extent possible in beach, dune, estuary, and wetland areas (LUP Policy 2.2.1)." In addition, LCP Policy 2.2.2.2 specifically protects scenic resources related to "coastal dunes and beaches" and requires all development to "be designed and sited to be unobtrusive and compatible with the visual character of the area." Within Moss Landing specifically, the LCP recognizes the scenic quality of the project area and LCP Policy 5.6.3.7.b states that buildings shall be of "low-lying vertical character (one and two stories) and small scale," use "natural wood for building facades," and encourage "removal or screening of unsightly storage areas." IP Section 20.144.030.B.3 states that within dunes the "design of structures, including fencing, shall incorporate natural materials, earth-tone colors, and otherwise blend with the rural setting." LCP Policy 2.2.2.5 also places a priority on retaining the natural topography of project sites, stating that grading should be minimized and "[d]isturbed slopes should be restored to their previous visual quality." See **Exhibit 7** for the text of the cited LCP provisions.

#### *Analysis*

The appeal contends that the County-approved project includes significant new development that would block and otherwise impair coastal views in a location that the LCP calls out for enhanced visual resource protection. The appeal further states that the building and related development do not appear to meet LCP tests with respect to low-lying and small-scale development that maintains natural topography and blends in with the character of the area.

The project site is located within a highly scenic area that contains coastal dunes and is adjacent to heavily utilized public access and public viewing areas, including the adjacent State Beach. The project includes construction of a 5,200-square-foot 30-foot-tall galvanized metal structure, space for 18 shipping containers, nearly 40,000 square feet of paving, a six-foot-tall chain-link perimeter fence, over 3,000 cubic yards of grading, and related structural development. In fact, the proposed project covers approximately 1.7 acres of coastal dune when the LCP states that development in such dune areas "should be prohibited to the fullest extent possible" under the LCP. And the 30-foot-tall building does not appear to be low lying or of a small scale as required by the LCP; rather it would be a significant structure that would block and otherwise impair public views in the beach and harbor area. None of the project elements, especially not the galvanized metal building, the 18 metal shipping containers, the pavement, and the perimeter chain link fence, utilizes natural materials in order to blend into the dune environment as required by the LCP. The project instead would be the antithesis of sensitive dune inspired design. Rather than eliminate existing, unpermitted unsightly storage areas as required by the

LCP, the project would enlarge such storage areas by providing space for 18 shipping containers on the site. Finally, the project does not maintain the site's natural dune topography and includes substantial grading to flatten the site and utilizes a 500-foot-long concrete retaining wall that would permanently alter the natural topography. Although some of the dunes on the site have previously been altered, the LCP requires disturbed slopes to be restored to their previous visual quality. All of the development will be plainly visible from public viewing areas and will significantly alter the existing dune topography. See **Exhibit 3a** for a visual simulation of the project.

In short, it does not appear that the project was evaluated against nor made to conform with LCP public view policies that apply in this case, including specific dune protection visual policies. On the contrary, the County-approved project represents a fairly industrial style storage facility that would appear to be more appropriate in an existing developed area than a dune. Thus the County's approval of the project raises a substantial issue of consistency with the LCP's visual protection policies.

#### **4. Public Access and Recreation**

##### *Applicable LCP and Coastal Act Policies*

LCP Policy 5.6.3.7(b) specifically addresses development in this sandspit area and states that "rehabilitation of existing structures and new development should include amenities for visitors such as pathways or boardwalks to the shoreline." Because the development is between the sea and the first public road, the public access and recreation policies of the Coastal Act are also applicable to the project. The Coastal Act requires public access to be maximized (Section 30210), prohibits development from interfering with the public's right to access (Section 30211), and requires new development to provide public access (Section 30212). The Coastal Act further protects water-oriented activities (Section 30220) and prioritizes oceanfront land for recreational uses (Section 30221). See **Exhibit 7** for the full text of these policies.

##### *Analysis*

The appeal contends that County-approved project does not include any pathways or boardwalks to the shoreline or any other public access amenities, but rather blocks this area from the public via the project components, including installation of a chain-link fence that physically blocks all access.

The project site is located directly adjacent to Salinas River State Beach and Moss Landing Harbor, which are both extremely popular public access locations. The project does not include any pathways or boardwalks to the shoreline or any other public access amenities or signs as required by the LCP. The County's staff report states that the project includes construction of their "fair share portion of a cul-de-sac" that would improve public parking. However, the project did not include any plans for the proposed cul-de-sac and thus it is not clear if such improvement is a requirement of the County's approval, and whether it would even be sufficient to find LCP and Coastal Act consistency in this case. Additionally, the project includes a six-foot-tall chain link perimeter fence that would act as a barrier to public access, contrary to the above-cited Coastal Act and LCP provisions that require maximization of public access and prohibit development from interfering with public's right to access. Thus the County's approval of the project raises a substantial issue of consistency with the public access and recreation policies of the Coastal Act and the LCP.

## 5. The Five “Substantial Issue” Factors

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 or does not raise a substantial issue of LCP conformance. The Commission has in the past considered the following five factors in its decision of whether the issues raised in a given case are “substantial”: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. In this case, these five factors, considered together, support a conclusion that this project *does* raise a substantial issue of LCP conformance.

Regarding the first factor, the County found the development consistent with applicable LCP ESHA provisions based in large part on prior habitat disturbance and existing development at the project site. As explained above, the Commission has long held that degraded dune habitat still has the potential to support rare and valuable natural resources and may constitute ESHA due to its viability. This stance has been affirmed in precedential caselaw. Here, Commission technical staff including its staff biologist, believe that the dunes onsite may still be viable as ESHA, despite their degraded status. Photographic evidence and background reports suggest that non-resource dependent development was approved within dune ESHA, which may have caused the degradation of the dunes which the County relied upon in concluding that the dunes did not constitute ESHA. Moreover, the County did not provide evidence that the existing development is legally permitted and thus the site disturbance appears to be the result of violations. All of which would support evaluating the site as undisturbed dune that appears to constitute dune ESHA.

Similarly, in terms of coastal armoring, the County did not evaluate whether the concrete retaining wall structure will function as a shoreline armoring device, even though it appears that the retaining wall will provide the same functions and have the same attendant impacts as a shoreline protective device. In short, in approving the project the County did not adequately justify that the retaining wall will *not* function as shoreline protection, regardless of whether the Applicant and County designated it as so or not. If the retaining wall will function as a shoreline protection device, the County did not provide any support to show that armoring for this project is allowable or that the impacts of such armoring have been appropriately mitigated. In fact, in terms of coastal hazards, the County did not analyze the impacts and issues associated with the range of applicable coastal hazards at this site, and did not require the Applicant to provide the LCP-required hazards reports. The County’s conclusion that the project minimized risks from coastal hazards is therefore not supported by factual evidence.

Similarly, the County approval appears to have not evaluated the relevant public viewshed and public access policies that apply to the site, and the degree to which the project conforms to such requirements is unknown and unjustified. All told, the County’s approval as a whole was simply not supported by the type of factual and legal support that would be necessary to allow approval



of the project in this form under the LCP and the Coastal Act.

Regarding the second factor, the extent and scope of the development as approved by the County is significant because the project would result in paving over approximately 1.7 acres of dune habitat of a 3.04 acre parcel (thus representing over 55% coverage of the project site), the construction of a 500-foot-long concrete wall that may act as a shoreline armoring device (for which allowance is highly restricted and regulated given their generally-known significant impacts to coastal resources), and the construction and placement of significant industrial style storage containers and a building. All of such approved development is located immediately adjacent to the State Beach and a public harbor near the end of the Moss Landing sandspit that is a very popular visitor destination. The extent and scope of the approved project is significant in this context, thus supporting a finding of substantial issue.

Regarding the third factor, the proposed development involves significant coastal resources because it is located in a highly scenic, sensitive, and rare dune area that is adjacent to a popular public beach and viewing area. Under the LCP and Coastal Act generally, ESHA (such as coastal dunes as designated by the LCP), public recreational areas, and coastal beaches are afforded some of the highest protection of coastal resources. And regarding the fourth factor, because the project raises such coastal resource protection concerns, including interpreting the LCP with respect to the type of development allowed within ESHA, what constitutes dune ESHA, the use and impacts of coastal armoring in high hazard areas, and the protection of significant public views and public access, and further considering that the County's approval so clearly does not follow LCP requirements in evaluating these coastal resources as explained above in this Report, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP.

Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to the importance of dune habitat and ESHA in Monterey Bay and statewide, the impact of shoreline armoring on the State's natural coastline and public beaches, the necessity of properly analyzing coastal hazards (including in light of an eroding California shoreline and sea level rise and the effect of these issues on public beaches and related resources), the protection of highly scenic areas along California's shoreline and significant public use and visitor destination areas, and the protection of the public's rights associated with access and recreation in the immediate shoreline area. In short, the County-approved project does not adequately address LCP coastal resource protection requirements or the Coastal Act's public access and recreation requirements, and the five factors on the whole support a finding of substantial issue.

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

- *Mitigated Negative Declaration for Monterey Bay Aquarium Research Institute, Monterey County. October 21, 2016.*
- *Updated Biological Report for Monterey Bay Aquarium Research Institute Proposed Field Program Staging Facility, Rana Creek Habitat Restoration. April 26, 2013.*
- *Update of Original Geotechnical Investigation Report for Staging Building and Storage Facility, Soil Surveys Inc. February 20, 2013.*
- *Archaeological Reconnaissance 7500 Sandholdt Road, Archaeological Consulting. February 26, 2008.*
- *Updated Transportation Analysis for MBARI Field Staging Building, Hatch Mott MacDonald. August 4, 2015.*
- *MBARI Moss Landing Preliminary Stormwater Control Report, Bestor Engineers, Inc. October 27, 2015.*

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

- MONTEREY BAY AQUARIUM RESEARCH INSTITUTE (MBARI)