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# Th13a

Appeal Filed: 8/24/2007  
49th Day: Waived  
Staff: Noelani Parker - SC  
Staff Report: 4/20/2018  
Hearing Date: 5/10/2018

## APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION ONLY

**Appeal Number:** A-3-SLO-07-046

**Applicant:** Marc Henry Eisemann

**Appellants:** Commissioners Steve Blank and Sara Wan

**Local Government:** San Luis Obispo County

**Local Decision:** Approved by San Luis Obispo County Planning Commission on July 20, 2007 (County CDP No. DRC2004-00270).

**Project Location:** 53 Ash Avenue, approximately 100 feet east of D Street, adjacent to Little Cayucos Creek, within the unincorporated Cayucos community of San Luis Obispo County (APN 064-114-013).

**Project Description:** Demolition of an existing warehouse and storage shed and associated fencing; construction of a 6,283-square-foot, three-story, mixed-use commercial and residential building; habitat restoration and recordation of an open space conservation easement.

**Staff Recommendation:** No Substantial Issue

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**Important Hearing Procedure Note:** This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally and at the discretion of the Chair, testimony is limited to three minutes total per side. Please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local

government (or their representatives), and the local government shall be qualified to testify at this stage of the appeal.

Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

## **SUMMARY OF STAFF RECOMMENDATION**

San Luis Obispo County approved a coastal development permit (CDP) for the demolition of an existing warehouse/sheds and subsequent construction of a 6,283-square-foot, three-story, mixed-use project. The project consists of three ground-floor offices equaling approximately 3,158 square feet plus 121 square feet of decking, and a 3,125-square-foot residence on the second and third stories, including a 658-square-foot garage on the ground floor, and 478 square feet of decking on the second story. The project is located adjacent to Little Cayucos Creek at 53 Ash Avenue in the unincorporated community of Cayucos in San Luis Obispo County. The Appellants contend that the County's approval raises questions regarding consistency with the County's Local Coastal Program (LCP) provisions related to protection of Environmentally Sensitive Habitat Areas (ESHA), including because the project encroaches within the otherwise-required minimum 20-foot setback from Little Cayucos Creek. After reviewing the local record, Commission staff has concluded that the approved project does not raise a substantial issue with respect to the project's conformance with the certified San Luis Obispo County LCP.

The project site is developmentally constrained due to the presence of the creek and the narrowness of the lots. Given the constrained nature of the site, the County approved the reduced creek setback by making a series of findings and conditions, notwithstanding that the approved development technically does not meet the LCP's minimum 20-foot creek setback. First, the County found that the development would be an improvement over existing conditions, including because the existing site consists of storage sheds and other small light industrial buildings located immediately adjacent to the top of the creek bank. Thus, the approved project, while it would still encroach into the setback, would remove these buildings and generally push the development envelope away from the creek to open up additional riparian habitat. Per the County's conditions, this opened-up area will be restored to functioning riparian habitat. Furthermore, the County required this portion of the riparian habitat, along with the entirety of the adjacent lot (together totaling 9,000 square feet), to be placed in an open space conservation easement for creek and habitat protection purposes, in perpetuity. No development would be allowed within these areas, including to protect habitat for sensitive species that are generally known to inhabit the area's creeks, such as California red-legged frog. These conditions were recommended by California Department of Fish and Wildlife (CDFW) staff, who worked with the County to ensure that the development would protect creek resources. With the required restoration and conservation easement, along with other siting and design techniques, and CDFW concurrence, the County found that the development would be consistent with LCP provisions regarding the protection of creek and riparian habitats.

In sum, the County made a series of findings and conditions to incorporate the recommendations from CDFW to ensure that the development would protect Little Cayucos Creek and its riparian habitat. While technically the LCP still requires a minimum creek setback of 20 feet, which this project does not meet, the County's conditions ensure that the development meets the intent of the LCP's provisions in terms of protection of creek and riparian habitat resources, while taking into consideration CDFW input and the challenging site conditions. The site is located within urban Cayucos, and replaces a series of small light industrial buildings that immediately abut the creek bank with a new mixed-use structure that incorporates water quality protection features and other measures to respect the integrity of the adjacent creek. Thus, the project is a relatively small infill development and is an improvement over existing conditions, including for creek habitat purposes. So, while other projects in different contexts may dictate a different conclusion, including ensuring that the minimum 20-foot creek setback is met, for this project in this case, any inconsistency with the LCP's minimum 20-foot setback is *de minimis* on these facts.

Staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP conformance issue, and that the Commission decline to take jurisdiction over the CDP for this project. The single motion necessary to implement this recommendation is found on page 5 below.

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### EXHIBITS

Exhibit 1: Project Location Maps

Exhibit 2: Project Site Photos

Exhibit 3: County-approved Project Plans

Exhibit 4: County’s Notice of Final Local Action

Exhibit 5: Appeal Contentions

Exhibit 6: Applicable LCP Provisions

## I. MOTION AND RESOLUTION

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission will not hear the application de novo and that the local action will become final and effective. To implement this recommendation, staff recommends a **YES** vote on the following motion. 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 an affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-SLO-07-046 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603. I recommend a yes vote.*

***Resolution to Find No Substantial Issue.** The Commission finds that Appeal Number A-3-SLO-07-046 does not present 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 Plan.*

## II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

### A. PROJECT LOCATION

The project site is located within an urban area two blocks inland of the Pacific Ocean at 53 Ash Avenue, approximately 100 feet east of D Street, in the unincorporated community of Cayucos in San Luis Obispo County. The project site consists of two adjacent rectangular lots that include a portion of Little Cayucos Creek and its riparian corridor. Each lot is 7,500 square feet in size for a total parcel size of 15,000 square feet (APN 064-114-013). Access to the site is via Ash Avenue; there, an alley parallels the western side of the site where the proposed development will take place. The creek and its riparian corridor are located on the eastern portion of the site. Currently the site holds a warehouse, which is being used for storage, and a shed and some related fencing. These developments currently extend immediately adjacent to the top of the bank of Little Cayucos Creek. The portion of the property located outside of the riparian corridor falls within the Office and Professional land use Category; the principally permitted uses in this land use category are office and professional, with residential use an allowed secondary use if the square footage of the residential use does not exceed 50% of the total building square footage on the site.<sup>1</sup> The portion of the property located within the riparian corridor, including the creek itself, is designated Recreation. Allowable uses in the Recreation land use category include crop production, public assembly, forestry, and fisheries and game preserves, among others. The site is surrounded by multi-family residential development to the north and east, commercial retail

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<sup>1</sup> The floor area of the residential component of the project (not including decking) is just under 50% of the total building square footage.

development to the south, and public facilities development (i.e., a post office) to the west. See **Exhibit 1** for project location maps and **Exhibit 2** for site photos.

## **B. PROJECT DESCRIPTION**

The County-approved project authorizes the demolition of an existing warehouse building and shed and related fencing and allows for the development of a 6,283-square-foot,<sup>2</sup> three-story mixed-use project. The project consists of three offices on the ground floor totaling approximately 3,158 square feet with 121 square feet of outdoor decking. The ground floor would also include a 658-square-foot garage to serve the residence. The second and third floors would consist of a 3,125-square-foot residence<sup>3</sup> and 478 square feet of outdoor decking on the second level. The proposed project includes walkways made of permeable pavers, a driveway, parking for the offices, and grading activities. The project will result in the disturbance of approximately 6,700 square feet of the 15,000-square-foot site. The County-approved project also includes a 9,000-square-foot open space conservation easement over Little Cayucos Creek and its riparian corridor, including restoration of riparian areas disturbed by construction activities. To accommodate the size of the project, the County approved a reduction in the LCP's required minimum creek setback from 20 feet to roughly two feet for parking and building access areas, and to about 16 feet for the walkway along the building and certain building elements (e.g., decks). The project also includes drainage features located within the riparian corridor and five feet from the top of the creek bank.

See **Exhibit 3** for the County-approved project plans.

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

On July 20, 2007, the San Luis Obispo Department of Planning and Building approved a Minor Use Permit/CDP (DRC2004-00270) for the mixed-use project. The County's notice of final local action was received in the Coastal Commission's Central Coast District office on August 10, 2007 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on August 13, 2007 and concluded at 5 p.m. on August 24, 2007. One valid appeal was received during the appeal period (see **Exhibit 5**).

## **D. APPEAL PROCEDURES**

Coastal Act Section 30603(a) 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, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not

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<sup>2</sup> This square footage does not include outdoor decking.

<sup>3</sup> This square footage includes the ground floor garage.

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 decision on this project is appealable because a residence is not the principally permitted use in the Office and Professional land use category and the entire project is located within 100 feet of a stream, i.e., Little Cayucos Creek.

The grounds for appeal under Section 30603(b) 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) 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 Commission finds that “no substantial issue” is raised by such allegations<sup>4</sup>. Under Section 30604(b), if the Commission considers the CDP de novo (upon making a determination of “substantial issue”) and finds that the proposed development is in conformity with the certified LCP, the Commission must approve a CDP for a project. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is not located between the nearest public road and the sea, and thus this additional finding would not need to be made if the Commission approves the project following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question is the Applicant (or its representatives), persons 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.

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

The Appellants contend that the County’s actions raise consistency issues with the County’s certified LCP’s policies and standards related to the protection of Sensitive Resource Areas (SRA) and Environmentally Sensitive Habitat Areas (ESHA), namely Little Cayucos Creek and its riparian habitat. Specifically, the Appellants contend that there appears to be a lack of evidence to show the County-approved project’s consistency in meeting the LCP’s 20-foot minimum setback requirement from Little Cayucos Creek and whether the reduced setback will have significant disruptions to creek habitat resources. The contentions also state that there may

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<sup>4</sup> The term “substantial issue” is not defined in the Coastal Act or in its implementing regulations. In previous decisions on appeals, the Commission has considered the following factors in making substantial issue determinations: 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 local government; the significance of the coastal resources affected by the decision; the precedential value of the local government’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. Even when the Commission chooses not to hear an appeal (by finding no substantial issue), appellants nevertheless may obtain judicial review of a local government’s CDP decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, Section 1094.5.

be alternative siting and design configurations that locate the development outside of the requisite 20-foot riparian buffer. See **Exhibit 5** for the full text of the appeal contentions.

## **F. SUBSTANTIAL ISSUE DETERMINATION**

The LCP includes an extensive policy framework protecting creeks and their associated riparian habitats, which the LCP designates as ESHA. The LCP requires development to protect and preserve the natural hydrological systems and ecological functions of coastal streams and adjoining riparian habitats (Coastal Plan Policy 20), requires development adjacent to coastal streams/SRAs to be compatible with the continuance of such habitat (Coastal Plan Policies 1, 2, 21, 29, and 35; Coastal Zone Land Use Ordinance (CZLUO) Sections 23.07.164(e), 23.07.174(a), 23.07.170(a)(b)(e)); and Estero Area Plan Chapter 7). With respect to specific setbacks, the LCP's Estero Area Plan includes a specific setback standard for development located adjacent to Little Cayucos Creek. Development must be set back a minimum of 20 feet from the creek, as measured from the outer limits of riparian vegetation or the top of the stream bank where no riparian vegetation exists (CZLUO Section 23.07.174(d) and Estero Area Plan SRA Setbacks – Coastal Streams). This minimum setback may be reduced to no less than 10 feet provided that certain findings are made, including that the reduced setback is necessary to provide for a principal permitted use and that adverse environmental effects are mitigated to the maximum extent feasible (CZLUO Section 23.07.0174(d)(2)). See **Exhibit 6** for the above-cited LCP provisions. Here, the approved project is not a principally permitted use (i.e., it is a conditional, mixed-use structure that includes residential and office uses), but still locates development within the minimum setback area, ranging from a few feet for parking and access areas, to about 16 feet for the walkway along the building and certain building elements (e.g., decks), and a location within the riparian corridor for certain drainage features (including a riprap attenuation area). In other words, the project as approved by the County does not meet the minimum setback requirements specifically applicable to the Estero Area Plan, nor does it meet the requirements to qualify for a reduction in the applicable minimum setback because the residential component is not the principally permitted use.

As stated above, a portion of Cayucos Creek and its riparian corridor are located on the eastern portion of the site. The width of the portion of the site located between the top of the creek bank and the adjacent property line ranges from 23 feet to 52 feet. Thus, if the County applied a 20-foot setback from the top of the creek bank, the developable area would only range from three feet to 32 feet in width. Thus, the development potential of the site is very constrained due to the presence of the creek and the narrowness of the lots. Given the constrained nature of the site, the County approved the reduced setback by making a series of findings and conditions. First, the County found that the development would be an improvement over existing conditions, including because the existing site consists of storage sheds and other small light industrial buildings located immediately adjacent to the top of the creek bank. Thus, the approved project, while it would still encroach into the setback, would remove these buildings and generally push the development envelope away from the creek to open up additional riparian habitat. Per the County's conditions, this area will be restored to functioning riparian habitat. Furthermore, the County required this portion of the riparian habitat, along with the entirety of the adjacent lot (for a total of 9,000 square feet) to be placed in an open space conservation easement for creek and habitat protection purposes, in perpetuity (see pages 15-16 of **Exhibit 4** for these conditions). No development is allowed within these areas, including to protect habitat for sensitive species that



are generally known to inhabit the area's creeks, such as California red-legged frog. These conditions were recommended from the California Department of Fish and Wildlife (CDFW), who worked with the County to ensure that the development would protect creek resources. With the required restoration and conservation easement, along with other siting and design techniques and the concurrence of CDFW,<sup>5</sup> the County found that the development would be consistent with LCP provisions regarding the protection of creek and riparian habitats.

In sum, the County made a series of findings and conditions to incorporate the recommendations from CDFW to ensure that the development would protect Little Cayucos Creek and its riparian habitat. While technically the LCP still requires a minimum setback of 20 feet, which this project does not meet, the County's conditions ensure that the development meets the intent of the LCP's provisions in terms of protection of creek and riparian habitat resources, while taking into consideration CDFW input and the challenging site conditions here. The site is located within urban Cayucos, and replaces a series of small light industrial buildings that immediately abut the creek bank with a new mixed-use structure that is located farther from the creek bank and incorporates habitat and water quality protection features and other measures to respect the adjacent creek (see **Exhibit 4** pages 13-20). Thus, the project is a relatively small infill development and is an improvement over existing conditions, including for creek habitat purposes. So, while other projects in different contexts may dictate a different conclusion, including ensuring that the minimum 20-foot setback is met, for this project in this case, the Commission finds that the County's approval does not raise a substantial LCP conformance issue, and declines to take jurisdiction over the CDP because any inconsistency with the minimum 20-foot setback is *de minimis* on these facts.

## **G. CONCLUSION**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a *de novo* CDP for such development. At this stage, the Commission has the discretion to find that the project does not raise a substantial issue of LCP conformance. As explained above, the Commission has in the past considered the following 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 not raise a substantial issue of LCP conformance. First, in terms of the reduced setback, the County conditioned the project to reduce effects to creek resources, taking into account the lots' constraints (i.e. narrow widths), and the nature of the uses that would occur within the setback. Examples of such measures include permeable pavers rather than chip seal or asphalt to increase percolation and help reduce potential erosion and sedimentation of Little Cayucos Creek. Within

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<sup>5</sup> Including re-concurrence by CDFW staff during an April 4, 2018 phone call with Commission staff.

the setback, mitigation via conditions for native plant restoration would also occur, providing a buffer between the approved development and the creek and enhancing the riparian vegetation of the area. Furthermore, an open space easement is required to be recorded over a portion of Little Cayucos Creek and its riparian vegetation, totaling 9,000 square feet, which will preserve the natural features in this area and be compatible with the biological continuance of the creek habitat.

Although such an approach to allowing a setback reduction is not necessarily supported by the LCP, the County addressed the fundamental policy concerns underlying the setback minimum (i.e., protection of Little Cayucos Creek and riparian habitat as ESHA) through establishment of conditions after consultation with CDFW. In other words, although the approved project's reduced setback may not be fully and technically consistent with the LCP, any such inconsistency is *de minimis* for the reasons specified above.

Second, with regards to the extent and scope of the development, no substantial issue is raised, including because the project is a relatively small infill development within an existing urban area that represents an improvement over existing conditions (i.e., better land use compatibility; increased creek setback, habitat restoration requirements). The extent of the development occurring within the setback is not only minimal, but has been mitigated for by the County's conditions with respect to the required conservation easement, habitat restoration, and water quality protections. Third, although Little Cayucos Creek is a significant coastal resource, the approved development would increase the development setback from the top of the creek bank compared to existing conditions. Additionally, measures such as those stated above (native revegetation, water-quality protection, and an open space easement) would enhance and be consistent with the biological continuance of the creek's habitat. Fourth, it is not likely that this decision would create an adverse precedent or a misinterpretation of the County's LCP in the future. Here, as discussed previously, the County may have deviated from the technical requirements of the LCP to approve a reduced setback but it appears that the County deviated only due to the unique site constraints on development potential at this site. Furthermore, through its findings and conditions of approval the County addressed the policy considerations of the LCP's setback reduction requirements, taking into account CDFW input and the challenging development site constraints, and by conditioning the project to place a 9,000-square-foot conservation easement over the creek and its riparian habitat. Finally, the project does not raise issues of regional or statewide significance because this appeal simply raises the issue, on this specific set of facts, of whether strict adherence to LCP requirements constitutes a substantial issue when a local approval otherwise is conditioned and approved to meet the intent of the LCP requirements.

For the reasons stated above, the Commission finds that Appeal Number A-3-SLO-07-046 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

**APPENDIX A – SUBSTANTIVE FILE DOCUMENTS<sup>6</sup>**

- Mitigated Negative Declaration dated February 1, 2007 (see Exhibit 4)
- County File for Minor Use Permit/CDP # DRC2004-00270

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

- California Department of Fish and Wildlife
- San Luis Obispo County Department of Planning and Building

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<sup>6</sup> These documents are available for review in the Commission's Central Coast District office.