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# F11a

Appeal Filed: 8/16/2019  
Action Deadline: 10/25/2019  
Staff: Brian O'Neill - SC  
Staff Report: 9/27/2019  
Hearing Date: 10/18/2019

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

**Appeal Number:** A-3-SLO-19-0180

**Applicant:** Shear Development Co., LLC

**Appellants:** Commissioners Linda Escalante and Erik Howell

**Local Government:** San Luis Obispo County

**Local Decision:** San Luis Obispo County Coastal Development Permit Application Number DRC2017-00029, approved by the San Luis Obispo County Board of Supervisors by a 3-2 vote on July 16, 2019.

**Project Location:** 282 Mar Vista Drive, 294 Mar Vista Drive, and 284 Highland Drive in the unincorporated Los Osos area of San Luis Obispo County just inland of Morro Bay (APNs 074-025-019, -017, -023)

**Project Description:** Construction of three single-family residences on three vacant parcels: (a 2,476-square-foot two-story residence on a 21,579-square-foot parcel; a 2,766-square-foot one-story residence on a 23,032-square-foot parcel; and a 3,008-square-foot two-story residence on a 22,296-square-foot parcel).

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

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**Important Hearing Procedure Note:** The Commission will not take testimony on this “substantial issue” recommendation unless at least three Commissioners request it. The

Commission may ask questions of the Applicant, any aggrieved person, the Attorney General or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally (and at the discretion of the Chair) limited to three minutes total per side. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

## **SUMMARY OF STAFF RECOMMENDATION**

San Luis Obispo County approved a CDP that authorized the construction of three single-family residences and related site improvements on three undeveloped lots in the Los Osos area of the County inland of Morro Bay, including authorizing sewer connections to the Los Osos community wastewater treatment plant system. The appeal contends that the County-approved project is inconsistent with numerous San Luis Obispo County Local Coastal Program (LCP) water supply and wastewater provisions, including those that require denial of projects where adequate water and wastewater supply are not available. The appeal also states the project is inconsistent with the LCP's ESHA provisions, which only allow uses dependent on the resource within such habitat areas, and only when such allowable uses are sited and designed in a manner that does not significantly disrupt habitat values. The appeal also states that the entire Los Osos community (including the project site) has been recognized as ESHA by the Commission, including due to much of this area being critical habitat for the federally endangered Morro shoulderband snail, and thus contends that the County's approval did not adequately analyze impacts to potential ESHA at the project site.

With respect to public services, LCP Public Services Policy 1 requires all development in the County to be served by adequate water and wastewater services, and requires denial of a proposed project should such services not be available. Los Osos is a community that has traditionally suffered from an inadequate water source (including in terms of water supply from an overdrafted groundwater basin and impacted water quality due to nitrate contamination) and inadequate wastewater collection and treatment system (including leaking individual septic systems). The Commission recognized all of these constraints when it approved the Los Osos Wastewater Project (LOWWP) in 2010 in CDP A-3-SLO-09-055/069. That CDP approved a new modern community wastewater treatment facility for Los Osos. However, due to potential growth inducement impacts (including impacts to water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified), and the need to better proactively and comprehensively plan for growth and mitigate impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP)), the Commission approved Special Condition 6.

Special Condition 6 prohibits wastewater service to undeveloped properties within the service area, such as those that are the subject of this appeal, unless and until the LCP is amended to identify appropriate and sustainable buildout limits. Although the County is working on the Los Osos Community Plan to this end, at this time the LCP has not been amended to establish

sustainable buildout in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect. Due to this prohibition, there is no wastewater service available to serve the approved project and the LCP therefore requires denial of the proposed development. Moreover, the County has not yet developed an approved groundwater basin management plan to monitor water supply and reduce extractions accordingly, which is a critical aspect of the LCP update that is required before the sewer connection prohibition of Special Condition 6 can be lifted. Thus, there is currently no evidence to support a determination that adequate water or wastewater services exist to serve the development as required by the LCP, and the County is in fact prohibited from providing sewer service to this property by CDP A-3-SLO-09-055/069.

Additionally, all of Los Osos is located atop an ancient dune system and the entire community has traditionally been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail. This project is located on the periphery of a more developed area. The project would lead to the permanent loss of over a half acre of potential ESHA, and would have impacts to any remaining ESHA as well as temporary construction related impacts. The County is currently in the midst of finalizing a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impacts of that development. However, although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, which is envisioned as part of the Los Osos Community Plan in process. Thus, and absent site-specific details, there is insufficient information in the record to conclude that this proposed project can be found consistent with the LCP's ESHA provisions, including a lack of evidence to support a determination that the project will not have adverse impacts to ESHA.

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

The proposed project is inconsistent with the San Luis Obispo County certified LCP for the same reasons for which the appeal raises a substantial issue: namely, the LCP requires that adequate public services be available to serve new development and that this type of development must assure no adverse impacts to ESHA. The project is prohibited from connecting to the LOWWP until such time that the LCP is updated to identify appropriate buildout limits and ensure that adequate wastewater services exist. Thus, the project does not have adequate wastewater service (and the County is prohibited from serving these sites) and there also is not sufficient evidence to determine whether there is adequate water to serve the proposed residences. Moreover, there is a lack of evidence to support a determination that the project will not have adverse impacts to ESHA. Thus, staff recommends that the Commission find substantial issue and take jurisdiction over the CDP application, and that the Commission subsequently deny a CDP for the proposed project. The motions are found on page 5 below.

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### EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – Approved Project Plans

Exhibit 4 – County’s Final Local CDP Action Notice

Exhibit 5 – Appeal of County’s CDP Decision

Exhibit 6 – County Informational Brochure “Vacant Lots in Los Osos – FAQs”

Exhibit 7 – Commission Staff Letters Regarding Special Condition 6

Exhibit 8 – Applicable LCP Provisions

## I. MOTIONS AND RESOLUTIONS

### A. Substantial Issue Determination

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

***Motion:** I move that the Commission determine that Appeal Number A-3-SLO-19-0180 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-19-0180 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 San Luis Obispo County Local Coastal Program.*

### B. CDP Determination

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

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-SLO-19-0180 for the development proposed by the applicant, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-SLO-19-0180 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 LOCATION

The County-approved project is located on three vacant parcels on the southern edge of the unincorporated community of Los Osos (at 282 Mar Vista Drive, 294 Mar Vista Drive, and 284 Highland Drive). Los Osos is an unincorporated coastal community of about 15,000 residents that is located in central San Luis Obispo County at the south end of Morro Bay and roughly due west of the City of San Luis Obispo. The Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California's coastal zone. Los Osos is generally located atop an ancient dune system formed by centuries of wind-blown sand coming from the southern end of Morro Bay. As a result, the terrain consists primarily of gently rolling hills and sandy soils. The sandy soils of Los Osos, its connection to Morro Bay, and its generally mild marine climate have combined to produce a unique coastal ecosystem that is home to a wide variety of uniquely adapted plant and animal species, some of which are found nowhere else in the world.

The project site consists of three noncontiguous undeveloped parcels. All three parcels are relatively flat with terracing along the perimeters. The lots are described as consisting of Baywood fine sandy soil with slopes ranging from 2 to 9 percent. The sites are covered primarily with nonnative grasses with coast live oak, Monterey cypress, and eucalyptus trees along the perimeters. The eastern portion of the lot at 295 Mar Vista includes a more heavily vegetated stormwater basin. The lot at 282 Mar Vista includes a volleyball court in the middle of the lot. The parcels are zoned residential single family, which allows for one residence per legal parcel.

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

### B. PROJECT DESCRIPTION AND HISTORY

The County's CDP approval authorized the construction of three single-family residences and related site improvements on three undeveloped lots along Mar Vista and Highlands Drive on the edge of a more developed portion of Los Osos.<sup>1</sup> The project includes a 2,476-square-foot, 23-foot-tall two-story residence on a 21,579-square-foot parcel at 294 Mar Vista Drive; a 2,766-square-foot, 19-foot-tall one-story residence on a 23,032-square-foot parcel at 282 Mar Vista Drive; and a 3,008-square-foot, 24-foot-tall two-story residence on a 22,296-square-foot parcel at

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<sup>1</sup> Note that these three lots were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved four of the residential units on four other lots, but explicitly chose not to approve the other four residential units on the remaining four vacant lots, three of which are the lots that are the subject of this current appeal. At that time the Commission found that there was too much uncertainty regarding wastewater service in Los Osos, and that it was inappropriate to allow development of these lots (i.e., those subject to this appeal) unless and until a new community wastewater treatment system could be developed (which it has, the LOWWP) and these lots could be served by it (which they cannot by the terms and conditions applicable to the LOWWP). The Commission at that time required that any development on these four lots, three of which are the subject of this appeal, would require future CDPs.

284 Highland Drive.<sup>2</sup> The County's approval also authorizes connections for each of the three residences to the Los Osos community wastewater treatment plant system. The County's approval also requires the project to offset its proposed water use at a ratio of 2:1. See the County- approved project plans in **Exhibit 3** and the County's conditions of approval in **Exhibit 4**.

### **C. SAN LUIS OBISPO COUNTY APPROVAL AND APPEAL HISTORY**

On December 15, 2017, the San Luis Obispo County Planning Department Hearing Officer denied the proposed project (CDP Application No. DRC2017-00029) based on LCP inconsistencies with respect to the protection of water quality and groundwater resources. The Applicant appealed the Planning Department's denial to the County's Board of Supervisors and on July 16, 2019 the Board ultimately approved a CDP for the proposed project by a vote of 3-2. Notice of the County's action on the CDP was received in the Coastal Commission's Central Coast District Office on August 2, 2019 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on August 5, 2019 and concluded at 5 p.m. on August 16, 2019. One valid appeal was received during the appeal period. See **Exhibit 5** for the full text of the appeal.

### **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 (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 this project is appealable because the proposed development is located within a sensitive coastal resource area and because the LCP does not designate one single principally permitted use within the residential single-family zoning district and thus all uses within this district are appealable.

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

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<sup>2</sup> The parcel at 284 Highland Drive (APN 074-025-023) appears to have been sold by the Applicant (Shear Development Co., LLC) and transferred to Central Coast Capital Investments, LLC on December 29, 2017. Thus it appears that Shear Development Co., LLC did not own the property at the time of the Board of Supervisors' approval, and thus the Applicant may not have had the legal authority to seek a CDP with respect to this parcel. However, because the Commission here would be denying the proposed project, the issue of whether the Applicant had the authority to secure a CDP for this parcel is moot. In any case, any approval of development on this parcel, i.e. either the currently proposed project or any future project, would be contingent on the existence of an applicant with the legal authority to encumber the parcel at 284 Highland Drive (APN 074-025-023).

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 may approve 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 not 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 not need to be made if the Commission were to approve the project following a de novo hearing (subsequent to a finding of substantial issue).

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant (or its 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 (if applicable).

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

Los Osos has traditionally suffered from inadequate water from an overdrafted groundwater basin and inadequate wastewater collection and treatment, which have led to adverse impacts to groundwater resources and environmentally sensitive habitat areas (ESHAs), including the Morro Bay Estuary. The appeal contends that the County-approved project is inconsistent with numerous San Luis Obispo County Local Coastal Program (LCP) water supply and wastewater provisions, including those that require denial of projects where adequate water and wastewater supply are not available. The appeal also maintains that the County-approved project is inconsistent with the LCP’s ESHA provisions, which only allow uses dependent on the resource within such habitat areas, and only when such allowable uses are sited and designed in a manner that does not significantly disrupt habitat values. The appeal also states that the entire Los Osos community (including the project site) has been recognized as ESHA by the Commission, including due to much of this area being critical habitat for the federally endangered Morro shoulderband snail, and thus contends that the County’s approval did not adequately analyze impacts to potential ESHA at the project site. Thus, the appeal states that the County’s approval raises significant questions regarding LCP compliance with respect to water, wastewater, and ESHA, including as it appears that there is not adequate wastewater service or adequate water available for the three approved homes, and impacts to ESHA at the sites were not adequately evaluated or mitigated. See **Exhibit 5** for 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” (California Code of Regulations, Title 14, Section 13115(b)). In previous

decisions on appeals, the Commission has been guided by the following factors in making such determinations: (1) the degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act; (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 appeal regarding the County’s approval of a CDP for the project presents a substantial issue.

## 1. Public Services

### *Applicable LCP Provisions and Los Osos Public Services Background*

The San Luis Obispo County LCP is divided geographically into four areas,<sup>3</sup> each with its own LCP area plan. The LCP also includes a Land Use Plan titled the “Coastal Zone Framework,” and an Implementation Plan titled the “Coastal Zone Land Use Ordinance” (CZLUO), which are both applicable throughout all LCP four areas. The subject properties are located within the area governed by the Estero Area Plan (EAP).

The Coastal Zone Framework lays out the main objectives of the LCP. With respect to Public Services, Public Policy 1 states that the amount, location, and rate of development must be kept within the sustainable capacity of resources, public services, and public facilities. CZLUO Section 23.04.430 carries out this policy, requiring the County to find that adequate public services exist prior to approving any new development in San Luis Obispo County (see **Exhibit 8** for this and other referenced and applicable LCP provisions). The Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood “adequate” public services in relation to water and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts.

The EAP recognizes that Los Osos has long suffered from inadequate public services, particularly related to water supply and wastewater capacity. The EAP states that “[p]erhaps no factor is of greater concern today than the future availability of potable water for Los Osos” and that “Los Osos is confronted with two basic problems. Groundwater extraction levels are rapidly increasing while groundwater quality is showing indications of possible deterioration.” Because Los Osos wastewater was traditionally handled through septic disposal within the same groundwater basin that supplies the Community’s potable water, the EAP states the two issues are “closely interrelated” due to a combination of highly permeable soils, high groundwater tables, and extensive community development that led to inadequately treated septic discharges into ground and surface water.

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<sup>3</sup> The County’s four areas are: North Coast, Estero, San Luis Bay, and South County.

The EAP acknowledges the community's need to resolve the interrelated issues of water and wastewater, particularly in relation to the important coastal resources impacted by these issues, including the groundwater basin, Morro Bay Estuary, and other sensitive habitats found throughout Los Osos. The EAP identified the need to create community-wide programs to deal with water and wastewater service, but also recognized the need for any public services projects to identify the appropriate "extent and density of development and its impact on groundwater quantity and quality."

Beginning in the early 1970's, the Regional Water Quality Control Board (RWQCB) and other health agencies began to raise environmental health and safety concerns regarding the use of septic systems in Los Osos. The RWQCB took a series of steps to address these concerns, beginning with adopting an interim Basin Plan in 1971 that included a provision prohibiting septic system discharges in much of Los Osos after 1974. In 1983, the RWQCB subsequently determined that the situation was worsening, and adopted a wastewater discharge prohibition for a portion of the Los Osos area known as the Prohibition Zone. In 1988, the RWQCB also established a discharge moratorium that effectively halted all new construction and all major expansions of existing development until a solution to the septic tank pollution problem could be developed and implemented.

There were a series of attempts to address the identified ground and surface water pollution issues in Los Osos through construction and operation of a wastewater project. In 1990, the Coastal Commission approved an amendment to the Estero Area Plan that would have allowed a conventional wastewater collection and treatment plant on rural agricultural land off Turri Road, which was subsequently abandoned in favor of an alternative site at South Bay Boulevard and Pismo Avenue. A County-approved CDP for a wastewater treatment project at this site was appealed to the Coastal Commission, but ultimately no action was taken by the Commission in order to allow the community an opportunity to pursue potential alternative wastewater projects. In 1998 a local ballot measure formed the Los Osos Community Services District (LOCSO). The LOCSO pursued a new CDP for a conventional wastewater collection and treatment project for a plant in the middle of town at the Tri-W site along Los Osos Valley Road. The Commission approved an LCP amendment in 2002 to allow a wastewater treatment at that site. In 2004, the Commission, on appeal, approved the project with conditions. Project construction commenced at the Tri-W site in 2005, but a newly elected LOCSO board suspended construction and the project was abandoned.

In 2006, wastewater authority for the Los Osos area was returned from the LOCSO to the County. The County embarked on an extensive alternatives evaluation to evaluate potential solutions to deal with the disposal of the wastewater for existing development. The County ultimately approved the Los Osos Wastewater Project (LOWWP), which provided for the construction and operation of a community sewer system, including a treatment plant on 30 acres located about one-half mile inland of Morro Bay, collection/disposal/reuse facilities, and all associated development and infrastructure. The County's approval of CDPs for the LOWWP project was appealed to the Coastal Commission and, upon a finding of substantial issue, the

Commission subsequently approved the project with a series of special conditions in 2010 (CDP A-3-SLO-09-055/069).<sup>4</sup>

Although the Commission recognized the immediate need for the LOWWP to resolve issues of groundwater contamination caused by the existing individual septic systems, the Commission also noted that the County had not done the planning necessary in order to determine the appropriate level of additional future development within Los Osos that could be accommodated while avoiding coastal resource impacts. As noted in the EAP and the Commission's approval of the LOWWP, the issues of water and wastewater are interrelated due to their impacts to the groundwater basin. Thus, a sustainable basin management program is critical to ensure that future development is limited to an environmentally sustainable level. Due to the potential growth inducement impacts of the LOWWP, including on a water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified, and on ESHA resources and the need to better proactively and comprehensively plan for growth and mitigate impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP)), the Commission approved the LOWWP subject to Special Condition 6. Per the Commission's findings:

*Special Condition 6 of this permit limits wastewater service to **undeveloped** properties within the service area unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits. This requirement builds on County conditions 86 and 92 requiring an HCP be prepared to address the potential for ESHA impacts as a result of community buildout. The HCP is intended to carry out LCP ESHA protection requirements and be effectively implemented before development of vacant land begins to occur and before providing service to undeveloped parcels. ...*

*Therefore, similar to the proposed project (i.e., via incorporated County condition 86), Special Condition 6 prohibits the provision of wastewater service to **undeveloped** properties within the service area 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. [emphasis added]*

Thus, unless and until the EAP is amended to identify sustainable buildout limits, including in terms of water usage/supply and ESHA considerations, the LOWWP is *prohibited* from serving undeveloped properties within Los Osos, including the three properties that are the subject of this appeal. At this time, although the County has made significant progress in developing a Los Osos Community Plan,<sup>5</sup> the LCP has yet to be amended to establish sustainable buildout in Los

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<sup>4</sup> Due to the manner in which the County acted on the CDP for the LOWWP (an overall approval action followed by an amendment action to modify a portion of the project), there are two Coastal Commission permit numbers associated with the project.

<sup>5</sup> The County published a Draft Environmental Impact Report for the Community Plan on September 12, 2019 and intends to bring the plan forward for Board of Supervisor and Coastal Commission approval in early 2020.

Osos. Thus Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect.<sup>6</sup>

The County has previously recognized that wastewater service to undeveloped parcels is currently prohibited, including through informational brochures that are distributed to Los Osos homeowners (see **Exhibit 6**) and a prior denial of new sewer connections to undeveloped properties.<sup>7</sup> Additionally, Commission staff has repeatedly informed the County and property owners of the prohibition (see **Exhibit 7**), including to explain that Special Condition 6 was intended to limit any expansion of wastewater service to facilitate increased growth and development in the community and thus must be interpreted broadly. The prohibition on new wastewater service therefore should not only be applied to clearly-applicable cases that involve new development on completely vacant parcels, but the prohibition must also apply to projects that include significant intensifications of use, significant expansions on already developed properties, or where the property owners previously purchased wastewater or water saving credits.<sup>8</sup>

#### *Appellants' Contentions*

The Appellants contend the County-approved project is inconsistent with the aforementioned groundwater resources and water supply policies. Specifically, they contend that public services within Los Osos are inadequate to serve new development, including because the Commission has previously recognized that fact through the imposition of Special Condition 6 on CDP A-3-SLO-09-055/069 and the continuing application of Special Condition 6 in light of present factual circumstances. See the Appellants' complete appeal documents in **Exhibit 5**.

#### *Analysis*

The County-approved project includes the construction of three new residences on three undeveloped parcels within Los Osos. The new residential structures would be served by the

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<sup>6</sup> The Coastal Commission has previously approved amendments to CDP A-3-SLO-09-055/069 to allow for expansions of the service area of the LOWWP in order to serve *already developed properties* so as to better protect coastal resources, such as in June 2016 to allow the Monarch Grove area to be added to the service area to avoid continued use of the area's failing wastewater treatment package plant. Such an amendment is consistent with the intent of the CDP and Special Condition 6 because the amendment provided for an immediate solution to the community's wastewater service issues with regard to *existing development* while not facilitating increased, growth-inducing development until the EAP is updated.

<sup>7</sup> See County CDP Application DRC2015-00092 (Novy SFD), denied by the County Planning Department on September 2, 2016.

<sup>8</sup> Los Osos residents have previously inquired whether properties that have secured wastewater or water saving credits (otherwise known as "Title 19 Retrofit Certificates") could be developed prior to the EAP update. In terms of wastewater credits, the RWQCB has indicated that any credits available from past actions were intended for properties that were already eligible to connect to the sewer. For example, if someone has a property that is eligible to connect to the community sewer system and wants to build prior to being hooked up to the sewer, then that person could utilize a credit to install a temporary septic system. However, as detailed above, only already-developed properties are eligible for sewer connections at this time and thus those properties would not need a temporary septic credit. In terms of water saving certificates, these certificates alone do not entitle development at this time. Although these water conservation certificates were previously issued to properties in the septic prohibition zone, the certificate does not guarantee the right to develop parcels upon completion of the sewer, but rather once the parcel is eligible to connect to the future sewer system. As described above, the key threshold before wastewater service can be provided to any undeveloped property is certification of an updated Los Osos portion of the Estero Area Plan by the Coastal Commission.

LOWWP, which is prohibited from serving undeveloped parcels due to Special Condition 6 of CDP A-3-SLO-09-055/069, as explained above. The County Planning Department's Hearing Officer originally denied the project, finding that the project was inconsistent with Public Policy 1 and that the project was ineligible to connect to the LOWWP due to Special Condition 6 (see **Exhibit 8** for all cited LCP provisions). The Hearing Officer's findings stated that "CZLUO Section 23.04.430 therefore requires denial of the project for a lack of adequate public services." The Applicant appealed the denial to the Board of Supervisors, which reversed the Planning Department's decision. On a 3-2 vote, the Board of Supervisors partially reversed the Planning Department's denial<sup>9</sup> and found that the project can be found consistent with Public Policy 1 because the project is required to retrofit existing development to offset the project's water demand on a 2:1 basis (see **Exhibit 4**). The County did not make any findings with regard to wastewater service, nor did the County state whether the project was consistent with the terms and conditions of CDP A-3-SLO-09-055/069.

As explained above, CZLUO Section 23.04.430 states that a "permit for new development that requires water or disposal of sewage shall not be approved unless the applicable approval body determines that there is adequate water and sewage disposal capacity available to serve the proposed development." In other words, a lack of either water or sewage disposal is grounds for denial of a project and the LCP requires the County to make a finding that there is adequate water availability and sewage disposal capacity to serve the development. Thus, the County must find that there is adequate water and sewage disposal capacity to serve any proposed development prior to approval.

With respect to sewage disposal, as explained above, Special Condition 6 of CDP A-3-SLO-09-055/069 prohibits the LOWWP from serving undeveloped properties, such as the three undeveloped properties at issue here. If the County were to connect the project to the LOWWP, the County would be in violation of CDP A-3-SLO-09-055/069 and subject to enforcement proceedings. Moreover, the RWQCB prohibits individual septic systems in this area due to the high likelihood of groundwater contamination, and thus the project is prohibited from installing septic systems as a means for sewage disposal. The project cannot legally connect to the LOWWP or install septic systems. Thus, the project lacks wastewater service, and the LCP requires denial of the project. In other words, until the EAP is updated in order to identify sustainable buildout limits in Los Osos and Special Condition 6's prohibition on sewage service to undeveloped properties is lifted, the current project cannot be found consistent with the LCP, namely Public Policy 1 and CZLUO Section 23.04.430, and in fact the County is prohibited from providing such services to these properties by the Commission's LOWWP CDP. Thus, the County's approval raises a substantial issue of LCP conformance with regard to whether there is adequate sewage disposal capacity to serve the development.

With respect to adequate water, Los Osos' entire water supply is extracted from a groundwater basin that has long suffered from overdraft conditions. Excessive groundwater pumping has led to seawater intrusion, water contamination, and adverse impacts to sensitive habitats. As

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<sup>9</sup> The Board of Supervisors approved three of four residences on four vacant parcels as originally proposed by the Applicant and denied by the Planning Department. Due to the potential presence of Morro shoulderband snails on one of the properties, the Applicant withdrew the fourth residence from the application prior to the Board of Supervisors final action on the project.

explained above, one of the main reasons the Commission included Special Condition 6 in the LOWWP CDP was because the County had not completed a comprehensive analysis and did not have enough information to identify a sustainable level of growth in Los Osos that could be served by adequate water without depleting the groundwater basin and causing other adverse impacts to coastal resources. Although the County is working diligently on this front, and intends to include same within the ongoing Los Osos Community Plan efforts, to date the County has not completed that analysis and has not yet identified a sustainable buildout limit. Although the project on appeal is required to implement water-saving retrofits, the County has not yet developed an approved basin management plan to monitor water supply and reduce extractions accordingly to ensure that such retrofits would actually be effective and subsequently that coastal resources are protected. Until such time as that basin management plan (or equivalent) is in place, which is a critical aspect of the Los Osos Community Plan update, there is currently a lack of evidence supporting a determination that adequate water exists to serve the development. Without additional evidence supporting the County's finding, the approval raises a substantial issue of LCP conformance with regard to whether there is adequate water to serve the development consistent with Public Policy 1 and CZLUO Section 23.04.430. In other words, the fact that the County's approval requires retrofitting of existing development to offset the project's water demand at a 2:1 ratio does not demonstrate that such a requirement ensures adequate water supply as required by the LCP.<sup>10</sup> Furthermore, project approval on this basis raises a substantial issue with respect to LCP consistency because it is not apparent that such an offsetting requirement alone demonstrates that there is adequate water to serve the development consistent with Public Policy 1 and CZLUO Section 23.04.430.

## 2. ESHA

### *Applicable LCP Provisions and ESHA Background*

The LCP includes a robust policy framework to prevent adverse impacts to ESHA. ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. ESHA Policy 2 requires development in or near ESHA to "demonstrate that there will be no significant impact on sensitive habitats" and provide: "a) the maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures" as a condition of approval. Because significant ESHA resources are known to occur within the County's urban areas, such as Los Osos, ESHA Policy 6 requires the County to create an off-site mitigation program in order to allow for development in urban areas that may not serve as long-term viable habitat in consideration of permanent protection of off-site ESHA. See **Exhibit 8** for all the ESHA provisions cited in this section.

With respect to wetlands and riparian areas, Coastal Watersheds Policy 1 provides that the "long-term integrity of groundwater basins within the coastal zone shall be protected." In addition, Coastal Watershed Policy 2 states that "[g]roundwater levels and surface flows shall be maintained to ensure the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organisms, and for the protection of human health." ESHA

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<sup>10</sup> And again, the Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood "adequate" public services in relation to water and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts.

Policy 7 adds: “Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored.” ESHA Policy 20 provides: “Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological system and ecological function of coastal streams shall be protected and preserved.” CZLUO Section 23.04.430, in conjunction with these LCP coastal resource policies, demonstrates the strong emphasis that the LCP places on ensuring that instream flows are adequate to protect groundwater aquifers, wetlands, and sensitive riparian habitats.

Los Osos is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California’s coastal zone. The Morro Bay watershed stretches inland to the foothills of the Santa Lucia Range, and a variety of coastal creeks and tributaries (including Los Osos, Warden, Chorro, and Morro Creeks) wend their way from the hills down through Los Osos and to Morro Bay, forming the area’s ESHA mosaic.

Most of the Los Osos built environment has been constructed on ancient dunes formed by centuries of wind-blown beach sand that was deposited along the south end of Morro Bay and, as a result, the terrain of Los Osos consists of gently rolling hills and sandy soils, often referred to as “Baywood fines.” The sandy soils and marine climate combine to produce a unique coastal ecosystem that is home to a wide array of plant and animal species, some of which are found nowhere else in the world. The dune, bluff, dune scrub, and chaparral communities that comprise this unique coastal ecosystem are all ESHA. The EAP recognizes that areas underlain by these types of soils are “included in the Sensitive Resource Area combining designation and are also an Environmentally Sensitive Habitat.” Since nearly all the urban area of Los Osos is underlain by this same sandy soil that supports ESHA and/or ESHA seed bank, the rebuttable presumption is that all of the undeveloped land within this area, including remaining vacant parcels such as the parcels at issue here, is comprised of the same sandy soils constituting ESHA under the LCP. In fact, the entire community has traditionally been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail.

#### *Appeal Contentions*

The appeal contends that the County did not make adequate ESHA findings, instead stating that because the three properties did not contain Morro shoulderband snails during site visits, no biological mitigations or monitoring was warranted. Additionally, the appeal contends that the project does not adequately address ESHA impacts because ESHA resources within Los Osos generally need to be protected proactively and comprehensively, including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP). Finally, the project may lead to impacts to wetland and riparian ESHA due to the community’s lack of a groundwater basin management plan and lack of long-term planning for the community’s water supply and sustainable buildout capacity which can be applied to prevent and mitigate for project impacts in that regard.

#### *Analysis*

The County-approved project includes the construction of three new residences on undeveloped parcels within Los Osos. The County did not make any findings regarding ESHA, nor did the County’s approval require any monitoring or mitigation for potential project impacts to ESHA.

The County noted that although Morro shoulderband snails were found on a parcel in the immediate vicinity of the project site, the biologist's report stated that snails were unlikely to be found on the subject parcels and no detailed field surveys were necessary.

As noted above, a rebuttable presumption exists that all of Los Osos is ESHA because it is underlain with sandy soil that supports ESHA or ESHA seed bank, in addition to providing potential habitat for sensitive species such as the Morro shoulderband snail. In other words, Los Osos is presumptively considered ESHA because of the habitat features it provides and its unique ecosystem, not necessarily because individual Morro shoulderband snails are or are not present at any given time, and this has been the Commission's consistent position in past CDP and LCP decisions affecting Los Osos. Additionally, the absence of individual snails at the time of the prior site survey is not conclusive evidence that sensitive species will not be present at a later date when the project is constructed. The County failed to include construction monitoring as part of the project approval, which would better determine the presence of sensitive species, such as Morro shoulderband snails, beyond a single survey and is required by LCP ESHA Policy 2.

Moreover, the County did not require any mitigation for the permanent loss of habitat that will be caused by the project. Ultimately, the project will include 24,742 square feet, or over a half-acre, of building and pavement coverage between the three parcels. The LCP requires that mitigation be included in the approval of any project within ESHA. However, the County did not require any mitigation for the permanent loss 24,742 square feet of area that may constitute ESHA. As also noted above, LCP ESHA Policy 6 states that mitigation for development within urban areas should be accomplished through a programmatic approach that includes off-site mitigation. The County is currently in the midst of creating such a program for Los Osos, in the form of an HCP, that will identify the appropriate areas for development within the community and will also identify suitable mitigation to offset the impact of that development. Until such time as the HCP (or an equally protective alternative) is complete and the program is incorporated into the LCP via the Los Osos Community Plan, individual project-level mitigation may not adequately offset potential ESHA impacts as required, and in this case, as stated above, the County required no such mitigation.

Without a programmatic approach to offset development impacts within Los Osos, or at a minimum project-level evaluation, monitoring and mitigation, the approval raises a substantial issue of LCP conformance with regard to terrestrial ESHA impacts.

Finally, as explained in more detail above, the project would be served by a water supply derived solely from groundwater basin extractions that are known to have caused adverse impacts to Morro Bay watersheds, wetlands, and associated habitats. Until such time that the County develops a groundwater basin management plan (or equally protective alternative), identifies a sustainable level of growth within the Los Osos community, and incorporates that planning effort into the LCP, any additional development, including the three residences at issue here, may accelerate groundwater basin depletion and lead to adverse impacts to wetland and Morro Bay watershed ESHA. Without additional evidence to show that the community can sustainably support increased residential development consistent with LCP resource protection policies, the approval raises a substantial issue of LCP conformance with regard to the protection of wetland and riparian ESHA.

### 3. 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. Most importantly for making the substantial issue determination in this case, regarding the first factor, the County found the development consistent with applicable LCP water supply and wastewater capacity policies without adequate justification. The County did not analyze whether the project is consistent with the terms and conditions of the LOWWP CDP (which was specifically approved by the Commission to provide wastewater service for development within the Los Osos area, and is specifically conditioned to prohibit provision of wastewater service for undeveloped parcels), nor did the County make any findings with regard to the state of the groundwater basin in terms of adequate water supply. Thus, the County has not provided adequate factual or legal support for its decision to allow these residences in an area where public services are known to be inadequate.

Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of substantial issue because the project would result in three new residences in an area that is generally subject to a rebuttable presumption of constituting ESHA and, thus, given the strict resource protections for ESHA reflected in the LCP, any amount of non-resource dependent development (such as the residential development here) raises a substantial issue with respect to LCP consistency. In addition, the approved project represents allowing multiple residences in an area where public services are scarce, the planning for how best to allot them is incomplete (namely through the required LCP amendment through the Los Osos Community Plan), and the County is actually prohibited from providing wastewater service to these sites altogether. All of these issues are substantial.

Regarding the third factor, the proposed project is located in an area where the depletion of groundwater adversely affects significant coastal resources, such as wetlands, the Morro Bay estuary and its watershed, due to a lack of water supply and impacts from seawater intrusion. As also discussed above, the Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California’s coastal zone. This factor supports a finding of substantial issue as well. Regarding the fourth factor, because the project raises such coastal resource protection concerns, including interpreting the LCP to allow for new residential development in areas without adequate public services and approving projects that would result in a violation of a Coastal Commission-issued CDP that was approved and conditioned specifically to provide wastewater service on a community-wide level in a manner consistent

with LCP policies, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP and allow for Coastal Act violations to occur. Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to the recent past history of statewide drought (which could recur) as such conditions relate to water availability, the importance of groundwater resources in San Luis Obispo County, and growth-inducing development issues in the Los Osos and the County more broadly. In short, the County-approved project does not adequately address LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue.

## **G. SUBSTANTIAL ISSUE DETERMINATION CONCLUSION**

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

For the reasons stated above, the Commission finds that Appeal Number A-3-SLO-19-0180 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and therefore the Commission finds that a substantial issue exists with respect to the County-approved project's conformance with the certified San Luis Obispo County LCP, and takes de novo jurisdiction over the CDP application for the proposed project.

## **H. COASTAL DEVELOPMENT PERMIT DETERMINATION**

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

### **1. Project Inconsistent with LCP Public Services Provisions**

As described in the "Substantial Issue Determination" section above, the Commission finds the project inconsistent with the San Luis Obispo County certified LCP for the same reasons that the Commission determined the appeal raised a substantial issue: namely, the LCP requires that adequate public services be available to serve new development and that this type of development assure no adverse impacts to ESHA. The project as approved by the County cannot be found consistent with these LCP provisions. See **Exhibit 8** for all LCP provisions cited below.

CZLUO Section 23.04.430 prohibits approval of new development unless it has been demonstrated that it can be served by adequate water supplies and wastewater services. With respect to wastewater services, as explained above, Special Condition 6 of CDP A-3-SLO-09-055/069 currently prohibits the LOWWP from serving undeveloped properties, such as the three undeveloped properties at issue here, until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits. If the County were to connect the project to the LOWWP, the County would be in violation of CDP A-3-SLO-09-055/069 and subject to enforcement proceedings. Moreover, the RWQCB prohibits individual septic systems in this area

due to the high likelihood of groundwater contamination and thus the project is prohibited from installing septic systems as a means for sewage disposal. Therefore, the project cannot legally connect to the LOWWP or install septic. Thus there is not sufficient sewage disposal capacity to serve the project and the LCP requires denial of the project until such time adequate sewage disposal capacity exists.

The Applicant argues that the Commission intended to allow development of these lots when a community sewer system was developed by basis of the Commission's action affecting them in 2004.<sup>11</sup> However, in that 2004 case, the Commission at the time actually found that there was too much uncertainty regarding wastewater service in Los Osos, and that it was inappropriate to allow development of these lots (i.e., those subject to this application) unless and until a new community wastewater treatment system could be developed (which it has, the LOWWP) and these lots could be served by it (which they cannot by the terms and conditions applicable to the LOWWP). Nothing in the record of the Commission's LOWWP approval suggests that the subject lots, or any other undeveloped lots, would be exempt from Special Condition 6's prohibition on connections to undeveloped properties. Thus, as explained above, the intent of Special Condition 6 is clear and wastewater service to the proposed residences is prohibited unless and until the EAP is updated.

The Applicant also argues that the subject lots are not undeveloped because they were outfitted with infrastructure when the subdivision was initially constructed (e.g., roads, sidewalks, sewer, etc.) including sewer laterals, and thus the prohibition of service to them by Special Condition 6 does not apply. The Commission does not agree. As alluded to above, there have been many attempts to circumvent the clear language and intent of Special Condition 6, namely its prohibition was put in place to allow for the proper water, wastewater, and ESHA LCP planning to occur so that allowable and sustainable development and growth could be identified, including through an HCP, LCP amendment and the Los Osos Community Plan. Until then, the Commission was clear that only *already existing* development in the service area that needed wastewater service was allowed LOWWP service. The Commission rejects an argument that *any* development (e.g., sidewalks in a subdivision, as the Applicant argues here) somehow negates the Commission's clear intent in this regard. These properties are simply not allowed LOWWP service due to Special Condition 6.<sup>12</sup>

With respect to adequate water, Los Osos' entire water supply is extracted from a groundwater basin that has long suffered from overdraft. Excessive groundwater pumping has led to seawater intrusion, water contamination, and adverse impacts to sensitive habitats. The Commission found that Special Condition 6 of the LOWWP CDP was necessary because the County had not completed a comprehensive analysis and did not have enough information to identify a sustainable level of growth in Los Osos that could be served by the current water supply without

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<sup>11</sup> Again, these three lots were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved four residential units on four other lots, but explicitly chose *not* to approve the then-proposed four residential units on the remaining four vacant lots, three of which are the lots that are the subject of this current application.

<sup>12</sup> Further, the Commission's 2004 approval required these particular lots to be preserved in their natural condition, and prohibited development of them until such time as such potential future residences could connect to the community sewer system (which, as explained above, is not until the EAP is updated). In other words, the proposed project is prohibited by the Commission's 2004 action as well.

depleting the groundwater basin and causing other adverse impacts to coastal resources. Although the County is working diligently on this front, and intends to include same within the ongoing Los Osos Community Plan efforts, to date the County has not completed that analysis and has not yet identified a sustainable buildout limit. Although the project is required to implement water-saving retrofits, the County has not yet developed an approved basin management plan to monitor water supply and reduce extractions accordingly to ensure that coastal resources will in fact be protected as proposed under the retrofit scheme. Furthermore, the County has not demonstrated that such a retrofit program alone can justifiably be deemed to ensure adequacy of water supply. Until such time as a basin management plan (or equivalent) is in place, which is a critical aspect of the Los Osos Community Plan update, there is currently a lack of evidence supporting a determination that adequate water exists to serve the development. In other words, the fact that the County's approval requires retrofitting of existing development to offset the project's water demand at a 2:1 ratio does not demonstrate that such a requirement ensures adequate water supply as required by the LCP.<sup>13</sup> Without additional evidence to determine whether there is in fact adequate water to serve the project without adversely impacting coastal resources, the LCP requires denial of the project until such time as an adequate water supply capacity exists.

## **2. Project Inconsistent with LCP ESHA Provisions**

ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. ESHA Policy 2 requires development in or near ESHA to demonstrate no significant impact to habitats and requires projects to include the maximum feasible mitigation measures and monitoring. Additionally, Coastal Watersheds Policy 1 provides requires long-term integrity of groundwater basins to be protected and Coastal Watershed Policy 2 requires groundwater levels to be maintained prevent adverse impacts to coastal waters, wetlands and streams. See **Exhibit 8** for all the LCP provisions cited in this section.

All of Los Osos, including the project site, has been recognized by the Commission as ESHA because it is underlain with sandy soil that supports ESHA or ESHA seed bank, in addition to providing potential habitat for sensitive species such as the Morro shoulderband snail. The LCP recognizes that any area that is underlain by "Baywood fines" soil is considered a Sensitive Resource Area and ESHA. The biological report that was completed for this project states that the subject properties include Baywood fines soils and thus the rebuttable presumption is that the entire project site constitutes ESHA. The proposed project would likely therefore lead to the permanent loss of over a half acre of ESHA, and would also impact adjacent ESHA and have temporary construction-related impacts to ESHA. The County is currently in the midst of creating a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impact of that development. However, although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been

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<sup>13</sup> And again, the Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood "adequate" public services in relation to water and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts.

identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, as is envisioned to occur as part of the Los Osos Community Plan in process. Thus, and absent site-specific details, there is insufficient information in the record to conclude that this proposed project can be found consistent with the LCP's ESHA provisions, including a lack of evidence to support a determination that the project will not have adverse impacts to ESHA.

Additionally, the project would be served by a water supply derived solely from groundwater basin extractions that are known to have caused adverse impacts to Morro Bay watersheds, wetlands, and associated habitats. Until such a time that the County develops a groundwater basin management plan (or functional equivalent), identifies a sustainable level of growth within the community, and incorporates that planning effort into the LCP, any additional development, including the three residences at issue here, may accelerate groundwater basin depletion and lead to adverse impacts to wetlands and Morro Bay watershed ESHA. Without additional evidence to show that the community can sustainably support increased residential development without impairing wetland and Morro Bay watershed ESHA, the approval cannot be found consistent with the LCP's Coastal Watersheds and ESHA provisions.

### **3. LCP Consistency Conclusion**

As discussed above, the proposed project is inconsistent with the LCP's provisions that require new development to ensure that adequate water and wastewater capacity is available to serve the project. The project may also have adverse impacts to environmentally sensitive habitat areas, which have not been adequately identified nor evaluated for whether avoidance and/or mitigation is necessary. Thus the project must be denied. Typically, the proposed project would need to be evaluated for consistency with other LCP policies and standards related to visual resources, archaeology and cultural resources, hydrology and water quality, parking and traffic, and land use and zoning. However, because the project is being denied due to substantial inconsistency with the LCP's groundwater resources, water supply, and ESHA provisions, these issues are not evaluated in this de novo review.

### **4. 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 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.

In the remainder of this section, staff evaluates whether, for purposes of compliance with Section 30010, denial of the proposed subdivision of the Applicant's property could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not, because the takings claim is not yet ripe.

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

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."<sup>14</sup> Similarly, Article 1, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner." Despite the slightly different wordings, the two "takings clauses" are construed congruently in California, and California courts have analyzed takings claims under decisions of both state and federal courts (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664.). The "damaging private property" clause in the California Constitution is not relevant to the current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The United States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 ("*Pennsylvania Coal*") [stating "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"]). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (*Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). The first category consists of those cases in which government authorizes a physical occupation of property (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426). The second category consists of those cases whereby government "merely" regulates the use of property and considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggest that the regulation has unfairly

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<sup>14</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R Co. v. Chicago* (1897) 166 U.S. 226, 239).

singled out the property owner to bear a burden that should be borne by the public as a whole (*Yee*, 503 U.S. at 522-523). Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (*Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S.470, 488-489, fn. 18). Here, because the current development proposal does not involve physical occupation of the applicant's property by the Commission, the Commission's actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved. (*Id.* at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" (*Id.* at 1017-1018 (*emphasis in original*); *Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 (regulatory takings occur only under "extreme circumstances."<sup>15</sup>).

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

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property (*MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Likewise, a "final and authoritative determination" does not occur unless the applicant has first submitted a development plan which was rejected and also sought a variance from regulatory requirements which was denied. (*Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1453-54.) An applicant is excepted from the "final and authoritative determination" requirement if such an application would be an "idle and futile act." (*Id.* at 1454.) Relying on U.S. Supreme Court precedence, the Ninth Circuit has acknowledged that at least one "meaningful application" must be made before the futility exception may apply, and "[a] 'meaningful application' does not include a request for exceedingly grandiose development'."

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<sup>15</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1029).

(*Id.* at 1455.) Furthermore, the Ninth Circuit has suggested that rejection of a sufficient number of reapplications may be necessary to trigger the futility exception. (*Id.* at 1454-55.)

***Denial of the proposed project would not result in a regulatory taking***

As analyzed above, application of CZLUO Section 23.04.430 requires denial of the proposed development on the grounds that Los Osos lacks sufficient public services to serve the project. Thus, it could be argued that the regulation results in an unconstitutional taking of the Applicant's private property. However, based on the law and facts analyzed below, it is unlikely that such a temporary denial of development on these facts would constitute an unconstitutional taking in this case.

At this time, application of CZLUO Section 23.04.430 (in further consideration of special condition 6 of the LOWWP CDP) has the effect of a moratorium on new development in Los Osos that requires water and wastewater service. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory takings. (*Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302 (*Tahoe-Sierra*)). In the *Tahoe-Sierra* case, the Court reasoned that, "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted" (*Id.* at 332). The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy (*Id.* at 337). "In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development" (*Id.* at 337-38). Here, application of CZLUO Section 23.04.430 to the factual circumstances on the ground has the effect of a temporary prohibition on economic use due to the lack of evidence of an adequate water supply and wastewater service to serve the proposed development as required by Public Policy 1 and CZLUO Section 23.04.430, and as soon as the water supply and wastewater service is found to be adequate to serve new development as a factual matter, the prohibition would not apply. Moreover, CZLUO Section 23.04.430 is an essential component of a comprehensive LCP planning tool that ensures that growth in Los Osos is efficient and sustainable, and that it does not exceed the community's resource carrying capacity in terms of avoiding significant adverse impacts to coastal resources, including water supply and wastewater service. It also ensures the protection of other significant natural coastal resources, such as sensitive terrestrial, wetland, and riparian habitat, and is intended to protect groundwater aquifers from adverse impacts such as seawater intrusion and subsidence.

This position is also consistent with the California Court of Appeal for the Fourth District reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4th 1068 ("*Pratt*"). In *Pratt*, the plaintiff argued that the Coastal Commission's decision to deny a CDP based on lack of water, due to the requirements of CZLUO Section 23.04.430(a) was an unconstitutional taking. The Court of Appeal upheld the Commission's denial of the CDP and found that it was not an unconstitutional taking. It stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, "Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm." (*Id.*) The court also found that an "intent-to-serve letter" from a community

water supplier did not change the result because there is no rule that the water company's determination is definitive. (*Id.*) "It is undisputed," the court continued, "that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft." (*Id.*) The court further reasoned that the plaintiff-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. As in *Pratt*, in this case it is the lack of public services (water availability and wastewater service) in Los Osos, not the regulation, that has temporarily delayed the Applicant's ability to develop the site. Finally, it is worth noting that the LCP policy which the court in *Pratt* held that, when applied, did not result in a taking is the same LCP policy which justifies denial of the proposed projects here (CZLUO Section 23.04.430). So an appellate court has already adjudged that temporary denial of a project on the basis that the project cannot demonstrate adequate water supply does not result in an unconstitutional taking of private property.

In sum, it is unlikely that the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with CZLUO Section 23.04.430, would result in an unconstitutional taking.<sup>16</sup> Although the regulation's effect is a *de facto* moratorium on new development at this time, this effect of the regulation is temporary in nature and caused by the factual circumstance of insufficient public services in Los Osos, rather than any prohibition on development inherent in the regulation itself.

## **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*

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<sup>16</sup> Although, as discussed previously in this report, denial of the proposed development is also justifiable on the basis of inconsistency with the LCP ESHA policies, denial on this basis also does not result in an unconstitutional taking of private property. As explained previously, for purposes of a takings analysis, a final and authoritative determination does not occur unless the Applicant has first submitted a development plan that was rejected, and also sought a variance from regulatory requirements that was denied. On the one hand, a request for a variance from strict application of the LCP ESHA policies is moot at this time since the proposed development must be denied on the basis of inadequacy of public services per the LCP, as discussed above.

However, assuming that in the future factual circumstances change such that the proposed development *can* be found to be served by adequate public services as required by the LCP, though denial of the proposed development is presently justified on the basis of inconsistency with LCP ESHA policies, this is so in part because the Applicant and County did not rebut the presumption that the project sites are ESHA by properly considering whether the sites constitute ESHA beyond a single survey of shoulderband snail presence. Per EAP Environmental and Cultural Resources Policy III.E., any area underlain by Baywood fine soils has the ability to support sensitive habitat and is considered ESHA and according to the biological report that was completed for this project, all three lots consist of Baywood fine soils. Thus, once the properties are properly identified as ESHA and evaluated consistent with LCP requirements, it may turn out that the project is not inconsistent with LCP ESHA provisions at all. Even if it is determined that the proposed project would be inconsistent with ESHA provisions, the project may be able to be revised and approved in a manner which avoids LCP ESHA inconsistencies. Or, if such inconsistency is unavoidable, the Commission may approve the minimum amount of development necessary to avoid an unconstitutional taking of private property, despite the LCP ESHA inconsistency. Given these various potential outcomes, all of which would avoid the outcome of an unconstitutional taking of private property, it would be premature at this time to assert that denial of the proposed development on the basis of LCP ESHA provisions results in an taking.

*Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*

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

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

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

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

**APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

- *Morro Shoulderband Snail Habitat Assessment and Protocol Survey Report for the Shear Development MUP DRC2017-00029, Lots 1, 3, 5, and 7 of Tract 2161, Los Osos, San Luis Obispo County, California.* Ecological Assets Management, LLC. March 14, 2019.

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

- SAN LUIS OBISPO COUNTY PLANNING DEPARTMENT
- OASIS ASSOCIATES, INC.