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# W27a

**Prepared October 25, 2019 (for November 13, 2019 hearing)**

**To:** Coastal Commissioners and Interested Persons

**From:** Jack Ainsworth, Executive Director  
Dan Carl, North Central Coast District Director  
Erik Martinez, Coastal Planner

**Subject: Dispute Resolution 2-19-1004-EDD (Ralston Single-Family Residence).** Public hearing and Commission determination on dispute over the appropriate coastal permit processing (pursuant to California Code of Regulations, Title 14, Section 13569) for the construction of a new roughly 2,600-square-foot residence, along with a detached garage and second unit and related residential development, at the end of Hermosa Avenue in the unincorporated Miramar area of San Mateo County.

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## SUMMARY OF STAFF RECOMMENDATION

After a local coastal program (LCP) is certified by the Coastal Commission, the certified local government takes on the primary coastal development permit (CDP) processing role, including making determinations regarding what type of development requires CDPs. Local government CDP processing decisions, though, may be challenged. When a processing decision is challenged, the Commission's regulations (and many LCPs) require the local government to consult with the Commission's Executive Director. Where the local government and the Executive Director agree on CDP processing, then that processing is what applies. Where they do not agree, then the Coastal Commission is responsible for resolving the disagreement. (All as specified in Section 13569 of the Commission's Regulations (California Code of Regulations (CCR), Title 14).

San Mateo County has a certified LCP, and determined that the proposed construction of a new 2,600-square-foot residence with a 650-square-foot detached garage with a 650-square-foot second unit above, on a 20,000-square-foot parcel at the end of Hermosa Avenue in the unincorporated Miramar area of San Mateo County, does not require a CDP because it is covered by Categorical Exclusion Order E-81-1 (that allows certain residential development in the County to be authorized without the otherwise required CDP).<sup>1</sup> The County's determination was

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<sup>1</sup> The Coastal Act allows local governments to apply to the Coastal Commission for categorical exclusions that allow certain types of proposed development to be processed without CDPs (i.e., to "exclude" them from CDP processing requirements) pursuant to Coastal Act Section 30610. Such exclusions are subject to conditions and criteria, and can only be approved if the Commission finds that such development will not result in any coastal

challenged to the Executive Director by the Committee for Green Foothills, and the Executive Director determined that the proposed residence and associated development is located in an appealable area and, as such, does not meet the criteria to qualify for an exclusion under the categorical exclusion order,<sup>2</sup> and thus a CDP is required.

Specifically, the Executive Director disagrees with the County's CDP determination because site conditions and available evidence suggest that the property in question contains an intermittent stream and wetlands (including evidence of a stream with water moving across the property associated with mature arroyo willow thickets covering approximately 75% of the site). To help verify, the Commission's Ecologist, Dr. Lauren Garske-Garcia, visited areas immediately surrounding the site, reviewed the relevant project materials, and concluded that the biological resources on-site would qualify as an intermittent stream and a wetland based on available evidence. Based on the presence of either such features, the proposed development is located in a geographically appealable area that cannot be categorically excluded per Order E-81-1. Thus, a CDP is required for the construction of the single-family residence and associated development under the Coastal Act and the LCP.

The County staff was provided this CDP determination which led to subsequent communications between the County, the Applicant's representatives, and Commission staff regarding the specifics of this determination in an attempt to reach resolution, including up until an email exchange on August 19, 2019 in which Commission staff reiterated that the Executive Director's determination was that a CDP is required for the proposed development. However, County staff stood by its determination that the proposed development was exempt from CDP requirements on the basis of Order E-81-1. As a result, under CCR Section 13569, the Commission is required to resolve the issue of the CDP processing requirements for the proposed project. **Staff recommends that the Commission concur with the Executive Director's determination that proposed the project requires a CDP.** The motion to implement this recommendation is found on page 3 below.

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resource impacts, whether individually or cumulatively, and if the Commission approves the categorical exclusion by at least a two-thirds vote.

<sup>2</sup> Per the terms and conditions of Order E-81-1, otherwise excludable development that falls within the Commission's geographic appeal area is not eligible for the categorical exclusion, and instead requires an appealable CDP.

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### EXHIBITS

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Exhibit 2: Project Site Photos

Exhibit 3: Categorical Exclusion Order E-81-1

Exhibit 4: CCR Section 13577

Exhibit 5: Coast Ridge Ecology Biological Impact Assessment Supplement

## I. EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director has determined that the proposed residence and associated development is not exempt from CDP requirements, and recommends that the Commission concur. If the Commission concurs, then notice of this Commission determination will be forwarded to San Mateo County and to the property owners. To concur with the Executive Director's determination, the Executive Director recommends a **NO** vote on the motion below. Following the Executive Director's recommended "no" vote will cause the motion to fail, resulting in: (1) the Commission upholding the Executive Director's determination that the proposed residence and associated development on Hermosa Avenue that is the subject of Dispute Resolution Number 2-19-1004-EDD requires a CDP; and (2) the adoption of the following resolution and findings. The affirmative vote of a majority of the Commissioners present is necessary to pass the motion.

**Motion:** *I move that the Commission **reject** the Executive Director's determination that the proposed residence on Hermosa Avenue that is the subject of Dispute Resolution Number 2-19-1004-EDD requires a CDP, and I recommend a **no** vote.*

**Resolution:** *The Commission, by adoption of the attached findings, determines, consistent with Section 13569 of Title 14 of the California Code of Regulations, that the proposed residence and associated development on Hermosa Avenue that is the subject of Dispute Resolution Number 2-19-1004-EDD requires a CDP.*

## II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

### A. DISPUTE RESOLUTION PROCEDURES

The Commission's regulations provide a resolution mechanism for disputes regarding CDP processing. CCR Section 13569 states:

**Section 13569 (Determination of Applicable Notice and Hearing Procedures).** *The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program. Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:*

(a) *The local government shall make its determination as to what type of development is being proposed (i.e. categorically excluded, appealable, non-appealable) and shall inform the applicant of the notice and hearing requirements for that particular development. The local determination may be made by any designated local government employee(s) or any local body as provided in local government procedures.*

- (b) *If the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion;*
- (c) *The executive director shall, within two (2) working days of the local government request (or upon completion of a site inspection where such inspection is warranted), transmit his or her determination as to whether the development is categorically excluded, non-appealable or appealable:*
- (d) ***Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request. (emphasis added)***

Thus, in a situation like this where the County and the Executive Director are not in agreement on the correct CDP process determination for the proposed project, the Coastal Commission resolves that dispute.

## **B. DISPUTE SUMMARY**

On June 4, 2019, San Mateo County determined that the proposed construction of a new 2,600-square-foot residence with a 650-square-foot detached garage and second unit, at the end of Hermosa Avenue in Miramar, was exempt from CDP requirements (see **Exhibit 1** for project location). The County's determination was allegedly based on San Mateo County Categorical Exclusion Order E-81-1, approved by the Commission in 1981, which exempts the construction of single-family residences within certain geographic areas subject to a specified set of criteria (**Exhibit 3**). On June 21, 2019, the Committee for Green Foothills (CGF) challenged the County's determination and alleged that the proposed residential development should require a CDP, appealable to the Coastal Commission, given the likelihood of significant adverse impacts of the development to the arroyo willow thicket on the property which is considered sensitive habitat under the San Mateo County LCP. On July 24, 2019, the County notified the Coastal Commission of the CGF challenge and asked for the Executive Director's opinion of the correct CDP processing, as is required by CCR Section 13569. Commission staff responded on July 25, 2019 via phone call and July 26, 2019 via email to both the County and the Applicant, informing them that it was the Executive Director's opinion that the project is located in a geographically appealable area (due to the presence of what appeared to be on-site stream and wetland areas), and therefore is not categorically excluded via Order E-81-1. Thus, the proposed project requires a CDP.

Subsequent communications occurred between the County, the Applicant's representatives, and Commission staff regarding the specifics of this determination in an attempt to reach resolution, including up until an email exchange on August 19, 2019 in which Commission staff reiterated that the Executive Director's determination was that a CDP is required for the proposed development. County staff stood by its determination that the proposed development was exempt from CDP requirements on the basis of Order E-81-1. As a result, the provisions of CCR Section

13569 specify that the Commission would be required to determine the appropriate CDP processing for the proposed project, and thus the dispute is now before the Commission.

### **C. CDP REQUIREMENTS AND CATEGORICAL EXCLUSIONS**

Coastal Act Section 30600 requires any person wishing to undertake development in the coastal zone to first obtain a CDP authorizing such development. Coastal Act Section 30106 and San Mateo County LCP Policy 1.2 both define “development” as:

*“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511). As used in this section, “structure” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.*

The proposed residential project includes erection and placement of solid materials and structures, grading, and a change in the intensity of use of land. As a result, the proposed project constitutes development requiring a CDP, unless otherwise exempted from CDP requirements by the Coastal Act. Specifically, the Coastal Act identifies certain exemptions from CDP requirements, including certain improvements to existing single-family homes and other structures, certain repair and maintenance activities, and certain disaster replacement projects (Coastal Act Section 30610.) In addition, Section 30610(e) allows for the Commission to exclude additional types of development from CDP requirements through adoption of categorical exclusion orders. The process for adopting such an exclusion order is that the local government identifies the type of development it wishes to exclude from CDP requirements and the circumstances under which it would be excluded; the Commission considers such request at a public hearing; and the Commission may adopt the categorical exclusion order, either with or without conditions, but only if at least two-thirds of the Commission finds that the excluded development has no potential for any significant adverse effects, either individually or cumulatively, on coastal resources.

### **D. SAN MATEO COUNTY CATEGORICAL EXCLUSION E-81-1**

In 1981, the Commission adopted Categorical Exclusion Order E-81-1 (**Exhibit 3**), which exempts from CDP requirements certain single-family dwellings in designated areas of Montara, Moss Beach and El Granada, and stating in applicable part as follows:

*The proposed Categorical Exclusion, consistent with the certified LCP, is intended to eliminate the requirement for a Coastal Development Permit for the uses described in areas: (1) defined as urban in the LCP, zoned R-1/S-17 or R-1/S-9, designated as medium density or medium low density residential in the Land Use Plan; and...*

*[Allowable exclusions for] Single-Family Residences [in those areas:]*

*On lots conforming to zoning district-regulations, the construction, reconstruction, demolition, repair, maintenance, alteration or addition to any single-family dwelling or accessory building which does not require a variance after: (1) applying Design Review (DR) District regulations and (2) reviewing and approving required geologic reports in hazardous areas as defined in Policy 9.10 of the Local Coastal Program. **All development must conform to the following criteria:***

- 1. Area is within urban boundary of the Local Coastal Program (LCP).*
- 2. Area was designated as Medium Density or Medium Low Density Residential in the Local Coastal Program.*
- 3. Area is zoned either R-1/S-17 or R-1/S-9.*
- 4. Area is not between the first public through road and the sea.*
- 5. Area is not in an existing or proposed Geologic Hazards (GH) Overlay Zone.*
- 6. Area is not within a 100-year floodplain.*
- 7. **Area is not within appeal jurisdiction of the Coastal Commission.***
- 8. Approval of any development in this category will not exceed the total number of residential building permits yearly authorized by the Board of Supervisors according to Policy 1.19 of the Local Coastal Program. (bold emphasis added, underline emphasis in original)*

Thus, Order E-81-1 allows certain residential development to be excluded from CDP requirements, but it explicitly *does not exclude* such development if it is located in areas that are in the Commission's appeal jurisdiction. The Commission's appeal jurisdiction includes development located within 100 feet of any wetland, estuary, or stream (Coastal Act Section 30603(a)(2)). Commission regulations define how the boundaries of these jurisdictional areas are determined (CCR Section 13577) (**Exhibit 4**). In short, if proposed development that would otherwise be excluded per Order E-81-1 is located in an appealable area, then it is not excludable and requires a CDP.

## **E. CDP DETERMINATION**

The County determined that the proposed residential project is located within the designated categorical exclusion area and meets the criteria for single-family residences defined in Order E-81-1, and is therefore exempt from a CDP. With respect to the question of appealability, the County determined that the project was *not* in an appealable area, relying on the Applicant's biological information that concluded that the property does not contain streams or wetlands because of the lack of a defined channel and a lack of wetland plants on the property (**Exhibit 5**).<sup>3</sup> The County's exemption determination was challenged by the Committee for Green

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<sup>3</sup> Coast Ridge Ecology, LLC: *Clarification on Classification of Willow Thicket Habitat on Hermosa Avenue Property, Miramar Half Moon Bay, California (Parcel C, Volume 70 Parcel Maps 49-50)*, May 4, 2019; and

Foothills. After review of materials and a site visit, the Executive Director determined that the project is located in a geographically appealable area (due to the presence of on-site stream and wetland areas), and is not eligible for exclusion via Order E-81-1, and therefore requires a CDP.

The heart of the dispute is whether the project is located in a geographically appealable area or not. If it is in the appealable area, then the project is *not* excludable per Order E-81-1, and a CDP is required. If it is not in the appealable area, then the project can be properly excluded from CDP requirements pursuant to the Order. As described above, areas within 100 feet of wetlands and streams are in the appealable area. Thus, the question to be resolved is whether the habitat areas on the site constitute either wetlands or streams, and, if so, whether the proposed development is within 100 feet of same.

With respect to wetlands, pursuant to CCR Section 13577(b), an area is a wetland under the Coastal Act, including explicitly for appealability purposes, where there is hydrophytic vegetation, hydric soils, or surface water (see **Exhibit 4**). That is, the Coastal Act requires the presence of only one of these constituents for an area to be delineated as a wetland. In this case, the County did not perform a wetland delineation, nor did the Applicant. However, project biological information (including the Applicant's submittals, as well as submittals from the Committee for Green Foothills)<sup>4</sup> indicates that there is a significant arroyo willow thicket on the property, occupying approximately 15,000 square feet or 75% of the site (see Figure 1 and 2 in **Exhibit 2**). Arroyo willow is designated as a facultative wetland indicator species by the U.S. Army Corps of Engineers.<sup>5</sup> Given the presence and coverage of this indicator species on most of the site, it appears to be a "dominant" species, which means that the area is likely to delineate as a wetland based on the presence of this hydrophytic vegetation alone.<sup>6</sup> The Commission's Ecologist, Dr. Lauren Garske-Garcia, visited areas immediately surrounding the site, reviewed the relevant project materials, and concluded based on available evidence that the arroyo willow thicket should be considered a wetland under the Coastal Act and the LCP. Commission staff suggested that the County require (and/or the Applicant provide) a formal wetland delineation in order to provide a definitive basis for concluding that a wetland is either present or not, but no

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*Biological Impact Assessment for Hermosa Avenue Property, Miramar Half Moon Bay, California (Parcel C, Volume 70 Parcel Maps 49-50), March 2018.*

<sup>4</sup> Including the above-referenced Applicant-provided reports, as well as the reports developed as part of the County's further evaluation (i.e., *Peer Review of the Coast Ridge Ecology Biological Impact Assessment Report for Hermosa Avenue Property, Miramar, California* by Sol Ecology (July 2019), and *Review of Previously Prepared Biological Impact Assessment Related to Potential Development at a Property on Hermosa Avenue, San Mateo County, California* by Huffman-Broadway Group, Inc. (August 2019).

<sup>5</sup> The U.S. Army Corps of Engineers Wetland Delineation Manual is used for wetland delineation purposes throughout the United States, including the State of California. Per the Corps, arroyo willow is identified as a facultative wetland species in their National Wetlands Plant List (for the Western Mountain Valleys and Coasts Region). A facultative wetland species usually occurs in wetlands (67-99%), and is predominantly associated with soils that are permanently or seasonally saturated with water, meaning their presence is a strong indicator of a wetland habitat.

<sup>6</sup> For wetland delineation purposes, dominance is a quantitative test (in the Corps' methodology) of whether the surveyed plant community at a given point (based on % cover data across all strata - tree, shrub, herb & vine – and combined with the wetland indicator status –obligate, facultative wetland, facultative, facultative upland & upland) is dominated (>50%) by hydrophytic vegetation. Species with an indicator status of obligate, facultative wetland, or facultative generally qualify as hydrophytic in calculations of wetland species dominance.



such wetland delineation was performed. Because the Commission must construe the Coastal Act and regulations liberally in order to protect resources (Coastal Act Sections 30009 and 13003), the Commission cannot accept the absence of evidence as an indication that wetlands do not exist on the property, and finds that the site includes wetlands.

With respect to streams, CCR Section 13577(a) specifies that streams constitute those mapped by USGS or those identified in an LCP.<sup>7</sup> Here, USGS does not map this particular stream in its Half Moon Bay 7.5 minute quadrangle map (which are typically applied for this purpose), but the watercourse on site meets the definition of a riparian corridor associated with intermittent streams identified in the LCP and thus meets the criteria of CCR Section 13577(a) to further qualify as a stream for purposes of appealability. Specifically, the LCP defines riparian corridors for all streams:

*...by the “limit of riparian vegetation” (i.e., a line determined by the association of plant and animal species normally found near streams, lakes and other bodies of freshwater: red alder, jaumea, pickleweed, big leaf maple, narrow-leaf cattail, arroyo willow, broadleaf cattail, horsetail, creek dogwood, black cottonwood, and box elder). Such a corridor must contain at least a 50% cover of some combination of the plants listed.*

In this case, the on-site watercourse meets these LCP criteria because the biological information submitted indicates that there is water moving across the property, and adjacent vegetation meets the definition of a riparian corridor associated with perennial and intermittent streams (at least 50% cover of arroyo willow). The definition of streams per CCR Section 13577(a) includes streams that have no discernable bank as measured from the line closest to the stream where riparian vegetation is permanently established. Dr. Lauren Garske-Garcia also found that the presence of constructed channels on the adjacent lot upstream, visible channels of variable incisions and widths on the actual property, and the presence of a culvert at Alto Avenue south and downstream of the property indicating water flow has been regular enough to warrant redirection beneath the road, provides further evidence that the water feature present on the property qualifies as an intermittent stream. Further, significant surface flow has been repeatedly observed and documented from across at least three neighboring parcels and the flow has followed an apparently consistent path, helping demonstrate that the water is not simply sheet flow and flooding. Lastly, there also appears to be relatively clear and unmanipulated banks at various points along the drainage, as well as a streambed indicating a history of scour by flows. See Figure 4, 5, and 6 in Exhibit 2. Thus, the on-site watercourse constitutes a stream.

Having determined that the site contains both a wetland and a stream, the appealable area applies to development within 100 feet of same. In this case, measuring out 100 feet from the on-site wetland and stream encumbers the whole property, meaning any development on the property would be located in the appealable area, including the proposed residential project at issue here. In fact, even if only one or the other of the criteria were present (i.e., if it were only a stream and not a wetland, or only a wetland and not a stream), the whole property is so encumbered in either scenario. As a result, the property is located in the appealable area, and thus cannot be excluded

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<sup>7</sup> Where identification in an LCP can take the form of maps and/or textual descriptions of specific streams, or can take the form of a watercourse meeting LCP definitions and criteria for streams.

from CDP requirements by Order E-81-1. In conclusion, the proposed residential project requires a CDP.

#### **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS<sup>8</sup>**

- San Mateo County Categorical Exclusion Order E-81-1
- *Clarification on Classification of Willow Thicket Habitat on Hermosa Avenue Property, Miramar Half Moon Bay, California (Parcel C, Volume 70 Parcel Maps 49-50)*, by Coast Ridge Ecology, LLC, May 4, 2019
- *Biological Impact Assessment for Hermosa Avenue Property, Miramar Half Moon Bay, California (Parcel C, Volume 70 Parcel Maps 49-50)*, by Coast Ridge Ecology, LLC March 2018.
- *Peer Review of the Coast Ridge Ecology Biological Impact Assessment Report for Hermosa Avenue Property, Miramar, California* by Sol Ecology, July 2019
- *Review of Previously Prepared Biological Impact Assessment Related to Potential Development at a Property on Hermosa Avenue, San Mateo County, California* by Huffman-Broadway Group, Inc., August 2019.
- *National Wetlands Plant List (Western Mountain Valleys and Coasts Region)*, by U.S. Army Corps of Engineers, 2016.

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

- San Mateo County Planning and Building Department
- Committee for Green Foothills
- Randy Ralston – Applicant
- Peter Prows – Applicant Representative

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<sup>8</sup> Available for review at the Coastal Commission's North Central Coast District Office in San Francisco.