

CALIFORNIA COASTAL COMMISSION

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Appeal Filed: 2/21/19
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 Staff: D. Christensen - V
 Staff Report: 3/21/19
 Hearing Date: 4/11/19



STAFF REPORT: APPEAL – NO SUBSTANTIAL ISSUE

APPEAL NO.: A-4-MAL-19-0013

APPLICANT: Rajiv and Leena Dulepet

APPELLANT: Shobhan Paul

LOCAL GOVERNMENT: City of Malibu

LOCAL DECISION: Coastal Development Permit No. 08-028 approved by the Malibu City Council on January 28, 2019

PROJECT LOCATION: 31535 ½ Pacific Coast Highway, City of Malibu, Los Angeles County (APN 4470-009-059)

PROJECT DESCRIPTION: Construction of a new 3,969 sq. ft., two-story single family residence with a 681 sq. ft. attached three-car garage, 898 sq. ft. attached accessory dwelling unit, spa, grading, retaining walls, landscaping, hardscape, driveway, hammerhead turnaround, and an onsite wastewater treatment system.

STAFF RECOMMENDATION: No Substantial Issue Exists

MOTION & RESOLUTION: Page 6

NOTE: This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally, and at the discretion of the Chair, testimony is limited to 3 minutes total per side. Please plan your testimony accordingly. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the *de novo* phase of the hearing will occur at a future Commission meeting during which it will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

The Commission's role at the "substantial issue" phase of an appeal is to decide whether the appeal of the local government action raises a substantial issue with respect to the grounds on which the appeal was filed, which can include a claim that the approved development is not in conformity with the applicable provisions of the certified LCP or with the public access policies of the Coastal Act (Pub. Res. Code §§ 30210-14). Staff recommends that the Commission, after public hearing, determine that **no substantial issue** exists with respect to the grounds on which the appeal has been filed. The motion and resolution for the "no substantial issue" finding are found on **page 6**.

The City of Malibu approved a Coastal Development Permit (CDP) for construction of a new 3,969 sq. ft., two-story single family residence with a 681 sq. ft. attached three-car garage and an 898 sq. ft. attached accessory dwelling unit located on a vacant, one-acre property at 31535 ½ Pacific Coast Highway in the City of Malibu. The subject property is approximately 1,000 ft. inland from Pacific Coast Highway and access to the site is from a private access road that is shared by several adjacent residential property owners. Existing residential development is situated on adjacent properties to the north, south, and east of the subject site. The parcel is zoned Rural Residential 5 (RR-5), and residential development is a permitted use within this zone.

A drainage course bisects the middle portion of the property in a north-south direction, and the drainage is flanked by steep canyon slopes. The City determined that the on-site drainage course meets the definition of ESHA under the LCP. The approved residential development is sited in the eastern portion of the property that is adjacent to the existing private access road and has been disturbed by fuel modification requirements associated with residential development on adjacent properties. Given the configuration of the property in relation to the drainage, a substantial portion of the property lies within either ESHA or the required 100 ft. buffer from ESHA. The development approved by the City in the subject CDP is located approximately 70 feet from the drainage course ESHA (at its closest point), which would be partly within the 100 ft. ESHA buffer required by the LCP, and fuel modification for the approved residence that is required by the Fire Department would extend into the area of the drainage ESHA.

The appellant is Shobhan Paul, a neighboring property owner to the east at 31505 Pacific Coast Highway. The appellant contends that the approved development encroaches into the on-site drainage course ESHA and has not been sited and designed to minimize impacts to ESHA, inconsistent with the ESHA protection policies of the LCP.

Given the size and configuration of the property, there is no siting alternative on the property that could provide the required 100 foot ESHA buffer or avoid required fuel modification from extending into the ESHA. In such cases, the LCP allows development in ESHA or ESHA buffer if the development: (1) conforms to the development area limitation of no more than 10,000 sq. ft. to allow for an economically viable use of the property, (2) minimizes impacts to ESHA to the maximum extent feasible, and (3) includes mitigation for unavoidable impacts to ESHA. In this case, the approved development has been clustered onto a single pad area that complies with the 10,000 sq. ft. maximum development area provision of the LCP and is oriented in a north-south direction to maximize the setback from the on-site stream corridor. The City also approved a fifty percent reduction (from 25 ft. to 12.5 ft.) in the required side yard setback along the east property boundary in order to allow the residence to be sited further away from the on-site stream ESHA.

The City analyzed several alternatives including reducing the size and footprint of the residence; however, given the configuration of the parcel and the location of the drainage on the site, any reduction in the development footprint would not significantly reduce the development's encroachment into the ESHA buffer, nor the extent of required fuel modification into ESHA. The City also considered other siting alternatives; however, any other location on the site would be on steep slopes that would be closer to the on-site drainage/ESHA and result in greater impacts to ESHA and greater landform alteration. Therefore, the City properly determined that the project has been sited and designed to minimize impacts to ESHA to the maximum extent feasible. Consistent with Section 4.8 of the Malibu LIP, the City required mitigation for unavoidable impacts to ESHA from the approved development as a condition of the CDP. As such, Commission staff recommends that the Commission find that the appellant's contentions regarding development within and adjacent to ESHA raise no substantial issue with regard to consistency with the ESHA policies and provisions of the certified LCP.

The appellant also contends that the amount of development, the size of the attached second unit, and the height of retaining walls exceed the limits of the LCP, and the approved grading plan for the project will require a large amount of soil export (approximately 2,000 cu. yds.) that will burden Pacific Coast Highway with truck traffic and generate a lot of greenhouse gas emissions. However, the approved project complies with the residential development standards of the LCP regarding second units, maximum development area, total development square footage, maximum impermeable coverage, grading and soil export, and retaining walls. The City's action adequately addressed these issues and was based on substantial evidence in the record. Therefore, Commission staff recommends that the Commission find that the appellant's contentions regarding new development raise no substantial issue with regard to consistency with the applicable LCP policies and provisions.

The appellant also asserts that the approved development would affect a private road and utility easement that is shared by neighboring property owners. However, this assertion is a private easement matter that is not related to a specific provision of the LCP and is not a valid ground for appeal. The appellant also states that the subject site burned in the recent 2018 Woolsey Fire and asserts that fire debris should be removed from the site to prevent it from mixing with runoff and being carried to the ocean. However, the site is vacant and this allegation is not related to the development approved by the City in the subject CDP; therefore, this appeal contention is not a valid ground for appeal. Pursuant to Coastal Act Section 30603(b)(1), the grounds for appeal are limited to an allegation that the appealable development does not conform to the standards set forth in the certified Local Coastal Program (LCP) or the public access policies set forth in the Coastal Act.

In summary, the City's record includes extensive factual evidence and legal support for the City's findings that the project is consistent with the policies and provisions of the certified LCP. The extent and scope of the subject development on this particular lot is relatively small, does not raise issues of regional or statewide significance, and the local action does not set an adverse precedent for future coastal development permit decisions. Although the stream and ESHA coastal resources at issue in this coastal development permit are significant, the approved development area in this case has been sited and limited in a manner that is consistent with the LCP to allow for an economically viable use of the property. Therefore, staff recommends that the Commission find that the appellant's contentions raise no substantial issue with regard to the approved project's consistency with the policies and provisions of the City of Malibu's certified LCP.

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Appendix A - Substantive File Documents

EXHIBITS

- Exhibit 1.** Vicinity Map
- Exhibit 2.** Site Aerial View
- Exhibit 3.** Project Plans
- Exhibit 4.** Appeal by Shobhan Paul
- Exhibit 5.** City of Malibu Final Local Action Notice for CDP No. 08-028

I. APPEAL JURISDICTION AND PROCEDURES

A. APPEAL PROCEDURES

The Coastal Act provides that after certification of Local Coastal Programs (LCPs), certain local government actions on Coastal Development Permit (CDP) applications for development in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal development permit actions. During a period of ten working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

1. Appeal Areas

Approvals of CDPs by cities may be appealed if the development authorized will be located within the appealable areas, which include the areas between the sea and the first public road paralleling the sea, 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 greater, on state tidelands, or along or within 100 feet of natural watercourses and lands within 300 feet of the top of the seaward face of a coastal bluff. (Coastal Act § 30603(a)). Any action on an application for development that constitutes a major public works project or a major energy facility may also be appealed to the Commission. (Coastal Act § 30603(a)(5)).

In this case, the City's CDP approval is appealable to the Coastal Commission because a significant portion of the approved residential development and associated fuel modification would be located within 100 feet of a stream.

2. Grounds for Appeal

The grounds for appeal of a local government approval of development shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program and/or the public access policies set forth in the Coastal Act (See Public Resources Code § 30603(b)(1)).

3. Substantial Issue Determination

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that no substantial issue exists with respect to the grounds of the appeal, the Commission will hear arguments and vote on the "substantial issue" question. A majority vote of the Commissioners present is required to determine that an appeal raises no substantial issues, and that the Commission will therefore not review the merits of the appeal *de novo*. If the Commission determines that no substantial issue exists, then the local government's coastal development permit action will be considered final.

4. De Novo Permit Hearing

Should the Commission determine that a substantial issue exists, the Commission will consider the CDP application de novo. The applicable test for the Commission to consider in a de novo review of the project is whether the proposed development is in conformity with the certified LCP and, if the development is between the sea and the first public road paralleling the sea, the public access policies of the Coastal Act. If a de novo hearing is held, testimony may be taken from all interested persons.

B. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

The project that is the subject of this appeal was approved by the City of Malibu Planning Commission on December 4, 2017. The action by the Planning Commission was appealed to the Malibu City Council by Ben Bindra on December 12, 2017. The appeal was denied and the permit for the project was approved by the Malibu City Council on January 28, 2019. The Notice of Final Action for the project was received by Commission staff on February 6, 2019 (**Exhibit 5**). Commission staff provided notice of the ten working day appeal period, which began on February 6, 2019, and ended on February 21, 2019. Shobhan Paul filed the subject appeal on February 21, 2019, during the Commission's appeal period (**Exhibit 4**). Commission staff notified the City, the applicant, and all interested parties that were listed on the appeal and requested that the City provide its administrative record for the permit. The administrative record was received on March 8, 2019. Pursuant to Section 30621(a) of the Coastal Act, a hearing on an appeal shall be set no later than 49 working days after the date on which the appeal is filed with the Commission.

II. STAFF RECOMMENDATION FOR NO SUBSTANTIAL ISSUE

MOTION:

I move that the Commission determine that Appeal No. A-4-MAL-19-0013 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

STAFF RECOMMENDATION OF NO SUBSTANTIAL ISSUE:

Staff recommends a **YES** vote. Passage of this motion will result in a finding of **No Substantial Issue** and adoption of the following resolution and findings. If the Commission finds **No Substantial Issue**, the Commission will not hear the application de novo, and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

RESOLUTION TO FIND NO SUBSTANTIAL ISSUE:

The Commission finds that Appeal No. A-4-MAL-19-0013 does not present a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

III. FINDINGS AND DECLARATIONS FOR NO SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND ENVIRONMENTAL SETTING

The Malibu City Council approved the subject CDP for construction of a new 3,969 sq. ft., two-story single family residence with a 681 sq. ft. attached three-car garage, 898 sq. ft. attached accessory dwelling unit, spa, 1,807 cu. yds. grading (1,625 cu. yds. cut, 182 cu. yds. fill), retaining walls, landscaping, hardscape, driveway, hammerhead turnaround, a 138-ft. long fire wall, and an onsite wastewater treatment system located on a vacant, one-acre property at 31535 ½ Pacific Coast Highway in the City of Malibu (**Exhibits 1-3**). The subject parcel is zoned Rural Residential 5 (RR-5), and residential development is a permitted use within this zone.

The subject property is approximately 1,000 ft. inland from Pacific Coast Highway and access to the site is from a private access road that is shared by several adjacent residential property owners. Existing residential development is situated on adjacent properties to the north, south, and east of the subject site.

A drainage course bisects the middle portion of the property in a north-south direction, and the drainage is flanked by steep canyon slopes. The eastern portion of the property that is adjacent to the existing private access road has been disturbed by fuel modification requirements associated with existing residential development on adjacent properties. The western portion of the property is also substantially within required fuel modification zones associated with existing residential development on adjacent properties; however, that area contains native coastal sage scrub vegetation since that portion of the property that is west of the drainage course is too difficult to access to conduct fuel modification.

The City's certified Land Use Plan (LUP) Environmentally Sensitive Habitat Area (ESHA) Map depicts ESHA on the western portion of the subject property. Additionally, Land Use Plan Policy 3.4 states that even resources not depicted on the Malibu ESHA Map are to be considered ESHA if the resources meet certain criteria, including any habitat area that is rare or especially valuable from a local, regional, or statewide basis. The City required a site-specific biological assessment of the subject property and found that the on-site drainage course meets the definition of ESHA under the LCP. The development approved by the City in the subject CDP would be located approximately 70 feet from the drainage course ESHA, at its closest point.

B. APPELLANT'S CONTENTIONS

The City's action was appealed by Shobhan Paul, a neighboring property owner to the east at 31505 Pacific Coast Highway. The appeal was filed on February 21, 2019, attached as **Exhibit 4**. The appellant contends that the approved development is inconsistent with the LCP for the following reasons: 1) the approved attached accessory dwelling unit exceeds the maximum size limitation of the LCP and would allow a multi-family dwelling in an area of primarily single family homes, 2) the approved development encroaches into a drainage course and ESHA and has not been sited and designed to minimize impacts to ESHA, 3) the approved development

exceeds the amount of development that is allowed by the LCP, 4) the approved grading plan for the project will require a large amount of export of dirt (approximately 2,000 cu. yds.) that will require trucks that generate a lot of greenhouse gas emissions and burden Pacific Coast Highway, and 5) the approved retaining walls exceed the height limits of the LCP.

The appellant also asserts that the approved development would affect a private road and utility easement that is shared by neighboring property owners. However, this assertion is a private easement matter that is not related to a specific provision of the LCP and is not a valid ground for appeal. The appellant also states that the subject site burned in the recent 2018 Woolsey Fire and asserts that fire debris should be removed from the site to prevent it from mixing with runoff and being carried to the ocean. However, the site is vacant and this allegation is not related to the development approved by the City in the subject CDP; therefore, this appeal contention is not a valid ground for appeal. Pursuant to Coastal Act Section 30603 (b)(1), the grounds for appeal are limited to an allegation that the appealable development does not conform to the standards set forth in the certified Local Coastal Program (LCP) or the public access policies set forth in the Coastal Act.

The contentions of the appeal are discussed and addressed in greater detail below.

C. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for an appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the locally-approved project's conformity to the policies contained in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. In this case, the appellant only raises issues pertaining to the new development and ESHA policies of the certified City of Malibu LCP; he does not raise any issues with the public access policies of the Coastal Act as grounds for appeal.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Cal. Code Regs., Title 14, Section 13115(b)).

In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the following factors:

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;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of 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 significant.

In this case, for the reasons discussed below, the Commission determines that the appeal raises no substantial issue with regards to the grounds on which the appeal has been filed.

1. Environmentally Sensitive Habitat Area

The appeal only made general assertions about the ESHA protection requirements and standards of the LCP. However, based upon the appellant's contentions, the following policies and provisions are applicable.

Coastal Act Section 30240, which is incorporated into the Malibu LCP as a policy, states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Land Use Plan Policy 3.1 states:

Areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments are Environmentally Sensitive Habitat Areas (ESHAs) and are generally shown on the LUP ESHA Map. The ESHAs in the City of Malibu are riparian areas, streams, native woodlands, native grasslands/savannas, chaparral, coastal sage scrub, dunes, bluffs, and wetlands, unless there is site-specific evidence that establishes that a habitat area is not especially valuable because of its special nature or role in the ecosystem. Regardless of whether streams and wetlands are designated as ESHA, the policies and standards in the LCP applicable to streams and wetlands shall apply. Existing, legally established agricultural uses, confined animal facilities, and fuel modification areas required by the Los Angeles County Fire Department for existing, legal structures do not meet the definition of ESHA.

Land Use Plan Policy 3.10 states:

If the application of the policies and standards contained in this LCP regarding use of property designated as Environmentally Sensitive Habitat Area, including the restriction of ESHA to only resource dependent use, would likely constitute a taking of private property, then a use that is not consistent with the Environmentally Sensitive Habitat Area provisions of the LCP shall be allowed on the property, provided such use is consistent with all other applicable policies and is the minimum amount of development necessary to avoid a taking.

Land Use Plan Policy 3.12 states (in applicable part):

For all ESHA other than wetlands, the allowable development area (including the building pad and all graded slopes, if any, as well any permitted structures) on parcels where all feasible

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building sites are ESHA or ESHA buffer shall be 10,000 square feet or 25 percent of the parcel size, whichever is less. If it is demonstrated that it is not feasible from an engineering standpoint to include all graded slopes within the approved development area, then graded slope areas may be excluded from the approved development area. For parcels over 40 acres in size, the maximum development area may be increased by 500 sq. ft. for each additional acre in parcel size to a maximum of 43,560-sq. ft. (1-acre) in size. The development must be sited to avoid destruction of riparian habitat to the maximum extent feasible. These development areas shall be reduced, or no development shall be allowed, if necessary to avoid a nuisance, as defined in California Civil Code Section 3479. Mitigation of adverse impacts to ESHA that cannot be avoided through the implementation of siting and design alternatives shall be required.

Land Use Plan Policy 3.14 states:

New development shall be sited and designed to avoid impacts to ESHA. If there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected. Impacts to ESHA that cannot be avoided through the implementation of siting and design alternatives shall be fully mitigated, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site or where off-site mitigation is more protective in the context of a Natural Community Conservation Plan that is certified by the Commission as an amendment to the LCP. Mitigation shall not substitute for implementation of the project alternative that would avoid impacts to ESHA.

Land Use Plan Policy 3.23 states:

Development adjacent to ESHAs shall minimize impacts to habitat values or sensitive species to the maximum extent feasible. Native vegetation buffer areas shall be provided around ESHAs to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect. All buffers shall be a minimum of 100 feet in width, except for the case addressed in Policy 3.27.

Land Use Plan Policy 3.28 states:

Variations or modifications to buffers or other ESHA protection standards shall not be granted, except where there is no other feasible alternative for siting the development and it does not exceed the limits on allowable development pursuant to Policies 3.10-3.13.

Land Use Plan Policy 3.59 states:

All new development shall be sited and designed to minimize required fuel modification and brushing to the maximum extent feasible in order to minimize habitat disturbance or destruction, removal or modification of natural vegetation, and irrigation of natural areas, while providing for fire safety, as required by Policies 4.45 through 4.54. Development shall utilize fire resistant materials and incorporate alternative fuel modification measures, such as firewalls (except where this would have impacts on visual resources), and landscaping techniques, where feasible, to minimize the total area modified. All development shall be subject to applicable federal, state and county fire protection requirements.

Local Implementation Plan (LIP) Section 4.7 states, in part:

Any coastal development permit application for a use other than one permitted in the ESHA overlay district, in which the uses permitted in this district would preclude construction of a residence on an undeveloped legal parcel, shall be subject to the provisions of this section. The uses of the property and the siting, design, and size of any development approved in ESHA or ESHA buffer, shall be limited, restricted, and/or conditioned to minimize impacts to ESHA on and adjacent to the property, to the maximum extent feasible. Where all feasible building sites are ESHA or ESHA buffer, the City may only permit development as specified below in Sections 4.7.1 through 4.7.4 of the Malibu LIP in order to provide the owner with an economically viable use of the property. In no case shall the approved development exceed the following maximum standards.

4.7.1. Development Area

No development shall be allowed in wetlands unless it is a permitted use identified in Section 4.5.1 of the Malibu LIP. In other ESHA areas, the allowable development area (as defined in Chapter 2 of the Malibu LIP) on parcels where all feasible building sites are ESHA or ESHA buffer shall be 10,000 square feet or 25 percent of the parcel size, whichever is less. For parcels over 40 acres in size, the maximum development area may be increased by 500 square feet for each additional acre over 40 acres in parcel size to a maximum of 43,560 square feet (one acre) in size. The development must be sited to avoid destruction of riparian habitat to the maximum extent feasible. The development area shall be reduced, or no development shall be allowed, if necessary to avoid a nuisance.

Local Implementation Plan Section 4.8.1 states, in part:

All new development shall include mitigation for unavoidable impacts to ESHA from the removal, conversion, or modification of natural habitat for new development, including required fuel modification and brush clearance, except as provided in Section 4.8.2 of the Malibu LIP for impacts to wetlands. The acreage of habitat impacted shall be determined based on the size of the approved development area, road/driveway area, required fuel modification on the project site, and required brush clearance, if any, on adjacent properties.

One of the following three Habitat Impact Mitigation methods shall be required: 1) habitat restoration; 2) habitat conservation; or 3) in-lieu fee for habitat conservation. The permit shall include conditions setting forth the requirements for habitat mitigation.

The City-approved project includes construction of a new single-family residence and accessory dwelling unit that is sited immediately adjacent to an existing private access road, within a disturbed portion of the site that is subject to the fuel modification requirements of adjacent residential development. A drainage course bisects the middle portion of the property. The City found that, although the on-site drainage course lacks riparian vegetation, the drainage course itself meets the definition of ESHA under the LCP. The development approved by the City would be located approximately 70 feet from the drainage course ESHA, at its closest point.

The appellant contends that the approved development encroaches into the on-site drainage course ESHA and has not been sited and designed to minimize impacts to ESHA, inconsistent with the ESHA protection policies of the LCP.

Land Use Plan Policy 3.1 of the certified LCP defines ESHA to include, among other resources, streams and riparian areas. The Malibu LUP ESHA Map contains most known watercourses and ESHA locations throughout the Malibu Coastal Zone. Even resources not depicted on the Malibu ESHA Map are to be considered ESHA if the resources meet certain criteria (pursuant to Land Use Plan Policy 3.4), including any habitat area that is rare or especially valuable from a local, regional, or statewide basis. Land Use Plan Policy 3.23 requires a minimum 100 ft. buffer from ESHA, to ensure development is at a distance sufficient to avoid impacts to the ESHA.

Although the on-site drainage is not identified as a stream Environmentally Sensitive Habitat Area (ESHA) on the City's LUP ESHA Map, based upon a site-specific biological assessment of the site, the City determined that the drainage is a stream that meets the definition of ESHA under the LCP. The project was reviewed by the City Environmental Review Board, as required by LUP Policies 3.39 and 3.40. A substantial portion of the subject parcel lies within either ESHA or the required 100 ft. ESHA buffer of the on-site stream. The approved project is sited in the eastern portion of the property that is adjacent to the existing private access road and has been disturbed by fuel modification requirements associated with existing residential development on adjacent properties. However, the approved project would be located approximately 70 ft. from the drainage course ESHA (at its closest point), which would be partly within the required 100 ft. buffer from ESHA and would result in fuel modification required by the Fire Department to extend into the ESHA.

Siting and design alternatives were analyzed by the City throughout the coastal development permit process; however, any other location on the property would be on steep slopes that would be closer to the on-site drainage/ESHA and result in greater impacts to ESHA and greater landform alteration. The City determined that there is no siting alternative on the property that could provide the required ESHA buffer or avoid required fuel modification from extending into the ESHA. Therefore, the City applied the provisions of LIP Section 4.7, which limit the development area that can be approved in such a case to allow for an economically viable use of the property. The approved development has been clustered onto a single pad area that complies with the 10,000 sq. ft. maximum development area provision of the LCP and is oriented in a north-south direction to maximize the setback from the on-site stream corridor. As such, the project has been designed, as well as conditioned by the City, to conform to the development area limitation of no more than 10,000 sq. ft..

In addition to the development area limitations, Section 4.7 of the LIP states, in part, the following in regards to the protection of ESHA:

The uses of the property and the siting, design, and size of any development approved in ESHA or ESHA buffer, shall be limited, restricted, and/or conditioned to minimize impacts to ESHA on and adjacent to the property, to the maximum extent feasible.

Further, Section 4.8(A) of the Malibu LIP states, in part, the following:

New development shall be sited and designed to avoid impacts to ESHA. If there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected.

The City required other siting and design measures that comply with these requirements to minimize impacts to ESHA. The City approved a fifty percent reduction in the required side yard setback along the east property boundary in order to allow the residence to be sited further away from the on-site drainage ESHA. Specifically, the required 25 ft. east side yard setback was reduced to 12.5 ft. Based on recommendations of the City Environmental Review Board, the approved project also includes: (1) landscaping with native, drought-tolerant species within the ESHA buffer area in order to be compatible with surrounding natural vegetation, and (2) constructing a 138 linear foot concrete block fire wall along the west side of the development area at the top of the canyon to minimize fire exposure on the steep canyon slopes that lead to the on-site drainage. The City also required conditions that limit night lighting on the site in order to assist in minimizing the disruption of wildlife.

City staff considered reducing the size and footprint of the residence; however, given the configuration of the parcel and the location of the drainage on the site, the City found that any reduction in the development footprint would not significantly reduce the development's encroachment into the ESHA buffer, nor the extent of required fuel modification into ESHA. Therefore, the City determined that the project has been sited and designed to minimize impacts to ESHA to the maximum extent feasible. Consistent with Section 4.8 of the Malibu LIP, the City required habitat restoration (or an in-lieu fee for habitat conservation) as mitigation for unavoidable impacts to ESHA from the approved development as a condition of the CDP.

The project, as approved by the City of Malibu, conforms to the ESHA protection policies and standards of the Malibu LCP. While the project is located within the required ESHA buffer, there are no alternative development locations that could provide the required buffer or significantly increase the buffer. Therefore, the approved project was sited and designed to conform to the provisions of Section 4.7 of the Malibu LCP. The project is consistent with the maximum 10,000 square foot allowable development area required by the LCP, and siting and design measures were included to minimize significant adverse impacts to ESHA. In addition, mitigation was required for the project's unavoidable impacts to ESHA. As such, the Commission finds that the appellant's contentions regarding development within and adjacent to ESHA raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP.

2. New Development

The appeal made general assertions regarding LCP development standards that pertain to the footprint of development, the size of accessory dwelling units, the height of retaining walls, and the quantity of grading that may be allowed. However, based upon the appellant's contentions, the following policies and provisions are applicable.

Coastal Act Section 30253, which is incorporated into the Malibu LCP as a policy, states (in applicable part):

New development shall do all of the following:

...

(c) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Board as to each particular development.

(d) Minimize energy consumption and vehicle miles traveled.

...

Local Implementation Plan Section 3.6 (Residential Development Standards) states, in part:

H. Development Area. Every residential development shall be contained within a convex-shaped enclosure that shall not exceed 2 acres, except where otherwise restricted by provisions of the ESHA Overlay Chapter (Chapter 4), Scenic and Visual Resources Chapter (Chapter 6), or Grading Chapter (Chapter 8) of the Malibu LIP.

I. Impermeable Coverage. Use of permeable surfaces is encouraged, especially for driveways. However, including the primary structure, impermeable surfaces are permitted for residential lot areas (excluding slopes equal to or greater than 1:1), up to ¼ acre at 45%; for lot areas greater than ¼ acre but a ½ acre or less, at 35% and for lots greater than ½ acre at 30% up to a maximum of 25,000 square feet.

K. Residential Structure Size. Except as specifically provided herein and where otherwise restricted by provisions of the ESHA Overlay Ordinance (Chapter 4), of the Malibu LIP, and as indicated on the Total Development Square Footage Structure Size Chart, the total development square footage associated with the construction of a single-family or multiple-family residence on a legal lot equal to or greater than 5 acres shall not exceed a total of 11,172 square feet. ... Total development square footage shall be determined based on the following formula (slopes equal to or greater than 1:1 shall be excluded from the lot area calculation): for lot areas up to ½ acre, total square footage shall be 17.7% of lot area plus 1,000 square feet; for lot areas greater than ½ acre and up to 1 acre, total development square footage shall be increased by 10% of the amount of lot area exceeding 1/2 acre ...

N. Accessory Structures. Accessory structures identified as being permitted within any zone may be established only if they are clearly accessory to a primary permitted or conditionally permitted use established concurrent with or prior to establishment of accessory use.

1. Second Residential Units

...

b. A maximum of one second residential unit may be permitted as an accessory to a permitted or existing single family dwelling. Development of a second residential unit shall require that a primary dwelling unit be developed on the lot prior to or concurrent with the second residential unit.

c. Development Standards

i. Siting. Any permitted second residential unit shall be located within the approved development area for the project site and shall be clustered with the primary dwelling unit and any other approved structures to minimize required fuel modification.

ii. Maximum Living Area. The maximum living area of a second residential unit shall not exceed 900 square feet, including the total floor area of all enclosed space, including any mezzanine or storage space. The maximum living area shall not include the area of a garage included as part of the second residential unit. ...

Local Implementation Plan Section 3.5.3(A)(4) (General Development Standards) states:

Retaining Walls: Retaining walls shall not exceed 6 feet in height for any one wall, nor 12 feet for any combination of walls (including required freeboard), and which shall be separated by at least 3 feet, are permitted in all yards.

Local Implementation Plan Section 8.3 (Grading Ordinance - Development Standards) states, in part:

A. Development shall be planned to fit the topography, soils, geology, hydrology, and other conditions existing on the site so that grading is kept to an absolute minimum.

B. Maximum Quantity of Grading. Notwithstanding any other provisions of the Malibu LIP, grading per lot of residential development, per acre of commercial development, or per acre of institutional development (total cut and fill) is limited to 1,000 cubic yards as follows:

1. In conjunction with any grading, so that the maximum is not greater than 1,000 cubic yards (exclusive of remedial grading) cut and fill may be allocated as follows:

a. Balanced cut and fill up to 1,000 cubic yards; or

b. Export of no more than 1,000 cubic yards; or

c. Import of no more than 500 cubic yards, where additional grading on site does not exceed 500 cubic yards in conjunction with any landform alteration so that the maximum is no greater than 1,000 cubic yards; or

d. Any combination of the above that does not exceed 1,000 cubic yards.

2. The export of cut material may be required to preserve the natural topography of the project site. Cut material may only be exported to an appropriate landfill or a site permitted to accept material.

C. Maximum Height of Cuts and Fills with Retaining Walls. 6 feet in height for any one wall, or 12 feet for any combination of walls, where a minimum 3-foot separation exists between walls, except single cuts up to 12 feet in height which are an integral part of the structure are permitted. Retaining walls shall be designed with smooth, continuous lines that conform to the topography.

...

Development Size

The appellant contends that the approved development exceeds the amount of development that is allowed by the LCP and the approved attached accessory dwelling unit exceeds the maximum size limitation of the LCP.

The Malibu LCP establishes the maximum density and intensity of new development. In the case of residential development, such standards as density, maximum development area, total development square footage, and maximum impermeable coverage establish the size and location of structures and maximum lot coverage.

The maximum allowable total development square footage (TDSF) for residential properties in the City pursuant to LIP Section 3.6 (K) is based on the size of the lot (excluding slopes equal to or greater than 1:1). The City determined that the maximum TDSF that may be allowed in the case of the subject site is 6,347 sq. ft. The approved project complies with that requirement and includes a TDSF total of 5,548 sq. ft., as follows: 3,969 sq. ft. single-family residence with a 681

sq. ft. attached three-car garage and an 898 sq. ft. attached accessory dwelling unit. In addition, as discussed in the previous section of this report, the approved development has been clustered onto a single pad area that complies with the 10,000 sq. ft. maximum development area provision of the LCP for development within or adjacent to ESHA.

To minimize impermeable surfaces for water quality protection, LIP Section 3.6 (I) limits impermeable coverage for residential properties to a maximum of 30% of the lot area (excluding slopes equal to or greater than 1:1) for lots greater than ½ acre. The LCP provision also states that the use of permeable surfaces is encouraged, especially for driveways. The City determined that the maximum impermeable coverage area that may be allowed in the case of the subject site is 11,009 sq. ft. The approved project complies with the requirement and includes an impermeable coverage total of 7,841 sq. ft. The appellant asserts that the approved driveway is not permeable; however, the LCP provision encourages permeable driveways and does not mandate them, as long as the approved development meets the impermeable coverage limits of the LCP, which it does in this case.

The subject parcel is zoned Rural Residential and residential development is a permitted use within this zone. The Malibu LCP allows a maximum of one second residential unit to be accessory to a permitted or existing single-family dwelling. Second residential units are required to be located within the approved development area, clustered with the primary dwelling, and limited to no more than 900 sq. ft. (including the total floor area of all enclosed space, but excluding the area of a garage) pursuant to LIP Section 3.6 (N). In this case, the approved project consists of a 3,969 sq. ft. single-family residence with an attached 898 sq. ft. second dwelling unit and an attached 681 sq. ft. three-car garage, which are clustered on a single pad area. The appellant asserts that the approved second unit exceeds the 900 sq. ft. limitation in the LCP because the City improperly excluded the kitchen and bathroom area of the second unit in calculating its size. However, the project floor plans in the City's record demonstrate that the attached second unit on the upper floor level of the approved residence is 898 sq. ft., which complies with LCP standards regarding the size and siting of second units on a residentially zoned property. Further, including an accessory dwelling unit does not convert this into a multi-family use that is inconsistent with surrounding single family homes. The LCP expressly allows for accessory dwelling units, and state law encourages the construction of accessory dwelling units such as this in residential zones.

For these reasons, the Commission finds that the appellant's contentions regarding development size raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP.

Grading and Retaining Walls

The appellant also contends that the approved retaining walls exceed the height limits of the LCP and the approved grading plan for the project will require a large amount of soil export (approximately 2,000 cu. yds.) that will burden Pacific Coast Highway and generate a lot of greenhouse gases.

LIP Section 8.3 ensures that new development minimizes the visual resource impacts of grading and landform alteration by restricting the amount of non-exempt grading to a maximum of 1,000 cu. yds. for a residential parcel. The total amount of proposed non-exempt grading is 650 cu. yds., which is less than the maximum allowable. The exempt grading (which is excluded from grading limitations pursuant to LIP Section 8.3) includes 356 cu. yds. of exempt understructure, and 801 cu. yds. of exempt safety grading. The City's findings state that the project is designed to minimize grading and landform alteration by incorporating the structure into the topography and utilizing the flattest area of the property. Based on the City's findings and project plans in the administrative record, the approved project complies with the grading requirements set forth under LIP Section 8.3.

The project also includes the construction of retaining walls to provide access improvements between the existing access road and the development site. LIP Sections 3.5.3(A)(4) and 8.3 limit the height of retaining walls to 6 feet in height for any one wall, or 12 feet for any combination of walls, where a minimum 3-foot separation exists between walls, except single cuts up to 12 feet in height which are an integral part of the structure are permitted. Retaining walls shall be designed with smooth, continuous lines that conform to the topography. Based on the City's findings and project plans in the administrative record, the approved project includes several retaining walls that are 6 feet or less in height and comply with the retaining wall requirements set forth under LIP Sections 3.5.3(A)(4) and 8.3.

The approved grading plan and the City's Total Grading Yardage Verification Certificate indicate that 1,443 cu. yds. of excess cut material will be exported. The appellant has asserted that this amount of export will be greater in reality. Soil does have shrinkage and swelling characteristics depending on compaction and moisture levels, which can increase or decrease the estimated quantity of material that needs to be exported. However, the City addressed this issue in its findings and found that, given re-compaction levels for the residence, driveway and other associated development, a similar amount of shrinkage is expected compared to the amount of swelling of loose soil to be exported. Therefore, the City determined that the amount of export (1,443 cubic yards) is not anticipated to increase much, if any, when also considering the shrinkage factor. Nonetheless, the City analyzed the potential impacts of truck trips required for this amount of material export, in terms of both traffic and greenhouse gas emissions.

The City's record indicates that the project would require 180 truck trips for material export (eight cubic yards can be hauled per trip, based on an average size dump truck). The City included a condition of CDP approval that would require a construction management plan to address issues such as materials, storage, construction traffic and worker parking. During the initial excavation, construction workers will be required to park off-site and be shuttled to the site, and flag people will also be required at the project site and along Pacific Coast Highway to direct traffic and avoid road closure. A dump truck parked by the subject parcel's driveway would not block the road and would allow vehicles (including fire trucks) to pass. The applicant also provided the City with a recent survey showing that the width of the shared driveway at the subject property is 20 feet, a width sufficient to accommodate a dump truck and fire truck.

Coastal Act Section 30253(c) and (d), which is incorporated into the Malibu LCP as a policy, requires new development to be consistent with requirements imposed by an air pollution control

district or the California Air Resources Board (CARB) and to minimize energy consumption and vehicle miles traveled. The City's action included the following analysis regarding greenhouse gas (GHG)¹ emissions, in applicable part:

On December 5, 2008, South Coast Air Quality Management District (SCAQMD) adopted an interim threshold for stationary sources². Regulated sources that emit over 3,000 metric tons of CO₂ equivalent (MTCO₂eq)³ per year for commercial/residential are considered a significant impact under CEQA. This threshold would represent a residential development of about 70 single-family dwelling units. The applicant provided the results of a California Emissions Estimator Model analysis for grading to compare with the appellant's calculation and to establish whether the proposed CO₂ emissions exceeded CEQA thresholds. The proposed project is estimated to generate a total of 11.2555 metric tons (MT) of CO₂ per year and 11.2599 MT of CO₂eq per year. This amount is less than half the 28.5 tons that is estimated by the appellant and is well below the threshold for a significant impact under CEQA.

The City determined, based on substantial evidence in the administrative record, that the project is designed to minimize grading and will not result in the generation of a significant amount of GHGs which would contribute substantially to global climate change and result in potential significant impacts to coastal resources. In light of these facts, the City's approval adequately addressed the LCP policies relating to grading, retaining walls, truck traffic, and GHG emissions. Therefore, the Commission finds that the appellant's contentions regarding these issues do not raise a substantial issue with regard to consistency with the policies and provisions of the certified LCP.

3. Factors Considered in Substantial Issue Analysis

The standard of review for the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the appealable development's conformity to the policies contained in the certified LCP or the public access policies of the Coastal Act. In this case, the appeal alleges several inconsistencies between the City's approval and the certified LCP. The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., Title 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following five factors that are addressed below.

The first factor in evaluating the issue of whether the appeal raises a substantial issue is the degree of factual and legal support for the local government's decision that the development is consistent with the subject provisions of the certified LCP. In this case, the City's record

¹ Greenhouse gases are any gas, both natural and anthropogenic, that absorbs infrared radiation in the atmosphere and includes water vapor, carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O). These greenhouse gases lead to the trapping and buildup of heat in the atmosphere near the earth's surface, commonly known as the "Greenhouse Effect." Carbon dioxide is the major anthropogenic greenhouse gas. All greenhouse gases are quantified collectively by the carbon dioxide equivalent, or the amount of CO₂ that would have the same global warming potential, when measured over a specific time period.

² A stationary source in air quality terminology is any fixed location where air pollutants can be emitted.

³ CO₂eq refers to Carbon Dioxide Equivalent, a measurement that expresses units of different greenhouse gases as equivalent to units of carbon dioxide in the ability to affect global warming.

includes extensive factual evidence and legal support for the City's findings that the project is consistent with the ESHA and new development policies and provisions of the certified LCP. There is substantial evidence in the City's record demonstrating that the approved project is sited and designed to minimize significant adverse impacts to ESHA to the maximum extent feasible in conformance with the provisions of Section 4.7 of the Malibu LCP. Further, the City's record includes substantial evidence that demonstrates the project conforms to LCP development standards relating to development size, impermeable coverage, grading and retaining walls.

The second factor in evaluating the issue of whether the appeal raises a substantial issue is the extent and scope of the development as approved. As described above, the project consists of a single-family residential development on an approximately one-acre rural residential lot. Given that this lot is not particularly large and the development type is consistent with the surrounding area, the extent and scope of the subject development on this particular lot is relatively small.

The third factor in evaluating the issue of whether the appeal raises a substantial issue is the significance of coastal resources affected by the decision. In this case, the project site is an infill lot that is adjacent to existing single-family residences. However, a stream exists on the subject lot that constitutes ESHA. Streams and ESHA are considered extremely significant coastal resources that are accorded maximum protection under the Malibu LCP. A substantial portion of the subject parcel lies within either ESHA or the required 100 ft. ESHA buffer of an on-site stream. The approved project would be located approximately 70 feet from the drainage course ESHA (at its closest point), which would be partly within the required 100 ft. buffer from ESHA and would result in fuel modification required by the Fire Department to extend into the ESHA. Although the coastal resources at issue in this coastal development permit are significant, the approved development area in this case has been sited and limited in a manner consistent with the LCP to allow for an economically viable use of the property.

The fourth factor in evaluating the issue of whether the appeal raises a substantial issue is the precedential value of the local government's decision for future interpretation of its LCP. In this case, the Commission finds that the City applied its LCP policies correctly in finding that the project is consistent with the policies of the LCP with respect to the grounds of the appeal. This includes the decision by the City to leave the private property issues between the applicant and appellant to be resolved separately by those parties. As such, the City's decision will have no adverse precedential value for future CDP decisions.

The final factor in evaluating the issue of whether the appeal raises a substantial issue is whether the appeal raises only local issues, or those of regional or statewide significance. In this case, the approved project is consistent with the policies and provisions of the LCP, will not result in any adverse impacts to significant coastal resources, and does not have any regional or statewide significance.

In conclusion, the Commission finds that none of the factors listed above, used to evaluate whether a substantial issue exists, favors a finding that a substantial issue exists. For the reasons discussed above, the Commission finds that the appeal raises no substantial issue with respect to the consistency of the approved development with the policies of the City's certified LCP. Applying the five factors identified above, the Commission finds the City's record adequately

supports its position that the proposed project is consistent with the applicable LCP policies. In addition, the development is relatively small in scope, does not have a significant adverse effect on significant coastal resources, would not be an adverse precedent for future coastal development permits, and doesn't raise issues of regional or statewide significance. Therefore, the Commission finds that the appeal does not raise a substantial issue with respect to the grounds on which it was filed.

APPENDIX A

SUBSTANTIVE FILE DOCUMENTS

Certified City of Malibu Local Coastal Plan; City of Malibu Administrative Record Regarding CDP No. 08-028 including City of Malibu City Council Staff Report dated January 9, 2019, and Planning Commission Staff Report dated November 21, 2017, and attachments thereto.