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Appeal Filed:	3/15/2019
Action Deadline:	5/24/2019
Staff:	Brian O'Neill - SC
Staff Report:	4/26/2019
Hearing Date:	5/8/2019

APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION & DE NOVO HEARING

Application Number:	**A-3-SLO-19-0017**
Applicant:	356 First Street LLC
Appellants:	Vicki Book and Anne Brown
Local Government:	San Luis Obispo County
Local Decision:	San Luis Obispo County Coastal Development Permit (CDP) Application Number SUB2015-00051, approved by the San Luis Obispo County Board of Supervisors on February 5, 2019.
Project Location:	356 and 360 First Street, Avila Beach, San Luis Obispo County (APN 076-217-015)
Project Description:	Subdivision to create two parcels, one of which is further subdivided to create a common parcel with four airspace condominium parcels (resulting in six total parcels); demolition of three existing single-family residences spanning the overall site; construction of a three-unit three-story hotel nearest Front Street on one parcel; construction of a four-unit three-story condominium building inland of the hotel on another parcel; and related development (including parking, infrastructure, and landscaping).
Staff Recommendation:	Substantial Issue Exists; Denial

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 (see California Code of Regulations, Title 14, Sections 13115 and 13117.)

SUMMARY OF STAFF RECOMMENDATION

San Luis Obispo County approved a CDP to allow a subdivision to create two parcels, one of which is further subdivided to create a common parcel with four airspace condominium parcels (resulting in six total parcels); demolition of three existing single-family residences spanning the overall site; construction of a three-unit three-story hotel nearest Front Street; construction of a four-unit three-story condominium building inland of the hotel; and related development (including parking, infrastructure, and landscaping) at 356 and 360 First Street in the unincorporated community of Avila Beach in San Luis Obispo County. The hotel would front on First Street with the three units ranging from 792 square feet to 900 square feet, all within a new roughly 3,600-square-foot Commercial Retail (CR) designated parcel. The condominium building would be located inland of the hotel with the four units each measuring 1,150 square feet, all within a new split-designated roughly 6,000-square-foot common parcel (part CR and part Residential Multi-Family (RMF)) where the condominium building would be located in RMF and access to it in CR.

The Appellants contend that the County-approved project is inconsistent with the certified San Luis Obispo County Local Coastal Program (LCP) because the project does not conform to development standards related to density, floor area, and open space; and is of a size and scope that will adversely impact the small town character of Avila Beach, including due to impacts on parking, affordability, and aesthetics. At its core, the appeal contends that the project has more density and intensity of use, and is overall larger, than the LCP allows for this site.

The primary issue with the County's approval here is that the overall property involved is 9,613 square feet, and the LCP's minimum parcel size for subdivision in both the CR and RMF land use categories is 6,000 square feet. Thus, the property cannot be divided into even two new parcels to begin with because at least one parcel cannot meet the LCP's minimum parcel size requirements (*i.e.*, subdivision of the 9,613 parent parcel to meet the minimum 6,000 square foot requirement for a subdivided parcel necessarily results in a substandard parcel of 3,613 square feet). And exacerbating that LCP consistency problem, the County here then relied on the ***entire*** 9,613-square-foot underlying property to identify the appropriate allowable level of development density, intensity, and scale for the ***condominium*** portion of the project when the LCP requires that all such determinations be made based on the underlying property actually being used for the approved use – in this case the one newly created split-designated parcel on which the

condominiums would be located (rather than this parcel ***and*** the CR-designated hotel parcel). In addition, whereas the LCP requires application of ***useable*** site area for such determinations, the County applied ***gross*** site area in its calculations, thus allowing greater development density, intensity, and scale (with respect to minimum parcel size, maximum density, maximum floor area, and minimum open area) than the LCP allows. The County also appears to have allowed reduced setbacks and parking requirements, and increased building heights, as compared to what the LCP would allow here. As a result, the County-approved project greatly oversubscribes the density, intensity, and scale of development for the underlying site, inconsistent with not only these specific LCP requirements, but also the LCP requirements protecting the character of Avila Beach, including through the LCP's Avila Beach Specific Plan.

Given the degree of LCP inconsistencies and the range of potential alternatives that the Applicant may want to consider to address same, including the ways in which development on the site might best be accommodated consistent with the LCP, staff does not believe that it is appropriate to try to identify conditions to make an LCP-consistent project in this case. Rather, staff believes that it makes most sense for this Applicant to go back and work through the local process using the correct LCP standards to develop a project, where that project can be vetted through a local process, including for the interested public and decision makers, as opposed to the Commission dictating a project that the Applicant has not proposed and has not had that local public participation.

Staff therefore recommends that the Commission find a substantial LCP conformance issue with the County approval (and thus take jurisdiction over the CDP application), and that the Commission, on de novo review, deny the CDP. The motions and resolutions are found below on page 5.

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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-19-0017 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-19-0017 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-19-0017 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-19-0017 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 project site is located at 356 and 360 First Street between San Luis Street and San Miguel Street in the unincorporated community of Avila Beach in San Luis Obispo County. The site is approximately 400 feet inland of the beach and one block inland from Front Street, which fronts the beach and supports the main business district of the community. The site is located within a mixed residential and commercial area on a 9,613-square-foot property that the County treated as a single site in its action.[1] More than half the property is in the area LCP-designated Commercial Retail (CR) (4,996 square feet) and the remainder is in the area LCP-designated Residential Multi-Family (RMF) (4,617 square feet). The property is currently developed with three single-family residences (that the County indicates have been abandoned), two on the CR portion of the site and one on the RMF portion of the site. See **Exhibit 1** for project location maps, **Exhibit 2** for photos of the project site, and **Exhibit 7** for the vesting tentative tract map and existing easements on the site.

B. PROJECT DESCRIPTION

San Luis Obispo County approved a CDP to allow subdivision to create two new parcels, one of which is further subdivided to create a common parcel with four airspace condominium parcels (all told resulting in six total parcels); demolition of the three existing single-family residences on the property; construction of a three-unit three-story hotel nearest Front Street; construction of a four-unit three-story condominium building inland of the hotel; and related development (including parking, infrastructure, and landscaping) at 356 and 360 First Street in the unincorporated community of Avila Beach in San Luis Obispo County. The hotel would front on First Street with the three units ranging from 792 square feet to 900 square feet, all within a new 3,596-square-foot commercial retail (CR) designated parcel. The hotel units would each be three stories with a carport on the first floor, bedroom on the second floor, and living room on the third floor. The condominium building would be located inland of the hotel, with the four condominium units each measuring 1,150 square feet, all within a new split-designated roughly 6,017-square-foot common parcel (with 1,400 square feet in CR and 4,617 square feet in RMF – see **page 1 of Exhibit 7**). The two-bedroom two-bathroom condominium units would be stacked atop each other in one three-story condominium building with some covered and some uncovered parking (six parking spaces) on the lowest level. The County also approved a one-foot height variance to allow for an elevator on the condominium building to provide for handicapped

[1] The County's findings and conditions refer to one underlying property, but the County has also separately informed the Commission that the County believes that there are actually two underlying legal parcels that make up the 9,613-square-foot property in question (i.e., a 4,996-square-foot parcel that fronts First Street in the area designated Commercial Retail (CR), and a second 4,617-square-foot parcel inland of that that is in the area designated Residential Multi-Family (RMF)). As will be discussed further in footnote 3 below, the Commission does not necessarily need to resolve the question of whether the existing property constitutes one or two legal lots in order to evaluate LCP consistency of the proposed development.

access, and the condominium development also includes a small storage unit.[2] See **Exhibit 3** for the County-approved plans, and **Exhibit 4** for the County's findings and conditions of approval.

C. SAN LUIS OBISPO COUNTY CDP APPROVAL

On September 27, 2019, the San Luis Obispo County Planning Commission approved CDP SUB2015-00051. That approval was appealed by Vicki Book and Anne Brown (i.e., the same Appellants as are appealing to the Commission) to the San Luis Obispo County Board of Supervisors, which on February 5, 2019 denied the appeal and upheld the Planning Commission's CDP approval. Notice of the County's action on the CDP was received in the Coastal Commission's Central Coast District Office on March 4, 2019 (see **Exhibit 5**). The Coastal Commission's ten-working-day appeal period for this action began on March 5, 2019 and concluded at 5 p.m. on March 18, 2019. One valid appeal was received during the appeal period. See **Exhibit 6** 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, (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 (see 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 (see Section 30603(a)(5)). The County's approval of this project is appealable because the project includes a subdivision, which is not designated as the principally permitted use for the CR or RMF land use categories under the LCP, and because the project is located between the sea and the first public road paralleling the sea, which in the Avila Beach area is Shell Beach Road near Highway 101.

The grounds for appeal under Section 30603(b)(1) are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to consider a CDP for an appealed project de novo unless a majority of the Commissioners present finds that "no substantial issue" is raised by such allegations. Under Section 30604(b), if the Commission conducts the de novo portion of an appeal hearing (upon making a determination of "substantial issue"), the Commission must approve a CDP if it finds that the proposed development is in conformity with the certified LCP. 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

[2] The project plans also show some project parking on an adjacent property, but it is unclear what the County approved on this adjacent site, and how it relates to this project.

the public access and recreation policies of Chapter 3 of the Coastal Act. This project is located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission were to approve the project following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant (or their representatives), persons opposed to the project who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing (see California Code of Regulations, Title 14, (CCR) Section 13117). Any person may testify during the de novo CDP determination stage of an appeal (if applicable).

E. SUMMARY OF APPEAL CONTENTIONS

The Appellants contend that the County-approved project is inconsistent with the County's LCP because the project: does not conform with the residential development standards related to density, floor area, and open space; and is of a size and scope that will adversely impact the small town character of Avila Beach, including due to impacts on parking, affordability, and aesthetics. See **Exhibit 6** for the full text of the appeal contentions.

F. SUBSTANTIAL ISSUE DETERMINATION

Substantial Issue Background

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" (14 CCR 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 County's approval of a CDP for the project presents a substantial issue.

Applicable LCP Provisions

The LCP is structured such that general LCP Coastal Zone Land Use Ordinance (CZLUO) provisions apply to this site, but so do planning area standards (in this case for the San Luis Bay Area Plan, including the Avila Beach Specific Plan). These LCP requirements generally require that the subject development be consistent with community character, and include specific development standards applicable to density, intensity, and scale (including for maximum height, useable site area, maximum density, maximum floor area, minimum open area, minimum

setbacks, maximum height, required parking, etc.). In this case, the project site includes both CR and RMF land use designations, and as explained in footnote 1, CR provisions apply to the portion of the site nearest First Street, and RMF provisions apply inland of that. Cited and applicable LCP policies and standards include:

> ***CZLUO Section 23.02.034(c)(4)(iv). Required findings.*** *The Review Authority shall not approve or conditionally approve a Development Plan unless it first finds that: the proposed project or use will not be inconsistent with the character of the immediate neighborhood or contrary to its orderly development.*
>
> ***CZLUO Section 23.04.029. Commercial and Office Categories.*** *This section establishes minimum parcel size standards for the Office and Professional,* ***Commercial Retail*** *and Commercial Service land use categories. The required area is based upon the availability of community services, as follows:* ***MINIMUM PARCEL SIZE: Community Water…Community Sewer - 6,000 Sq. Ft.*** *A commercial condominium or planned development pursuant to Section 66427 et seq. of the Subdivision Map Act, with individual unit ownership, may use smaller parcel sizes to be determined through Development Plan approval by the Review Authority, as set forth in Section 23.02.034, at the same time as tentative map approval.*
>
> ***CZLUO Sections 23.04.028(a-c)(in relevant part): Residential Single-Family And Multi-Family Categories.*** *The minimum parcel size is based upon the type of public road serving the property proposed for division, terrain features, and the type of sewage disposal facilities to be used for the parcels to be created. Minimum parcel size is determined by applying the three tests of this section to the features of the parcels to be created. The allowable minimum size is the largest area obtained from any of the tests, except as provided by subsection d of this section for condominium-type projects, and except for cluster divisions pursuant to Section 23.04.036.*[3] *Community water service is a prerequisite to land division in the Residential Single-Family and Multi-Family categories in every case.* ***a. Lot access test: …Road Type… Local – 6,000 square feet… b. Slope Test… 0-15% - 6,000 square feet… c. Sewage Facility… Community Sewer – 6,000 square feet.***
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> ***CZLUO Section 23.04.028(d). Minimum Parcel Size. Residential Single-Family and Multi-Family Categories.*** *Condominiums: A condominium, planned development or similar residential unit ownership project pursuant to Section 66427 et seq. of the Subdivision Map Act may use smaller parcel sizes to be determined through Development Plan approval by the Review Authority, as set forth in Section 23.02.034, at the same time as tentative map approval, provided that: (1) The common ownership external parcel is in compliance with the provisions of this section; and (2) The density of residential units is in compliance with Section 23.04.084 where the project is located in the Residential Multi-Family category.*

[3] Note that CZLUO Section 23.04.036's cluster division allowance is not applicable in the Residential Multi-Family land use designation.

CZLUO Section 23.04.082(b)(3). Single-Family Dwelling. Residential Categories. Residential Multi Family Category. *In land use categories where single-family dwellings or mobilehomes are identified by the Land Use Element as "A" uses, the number of dwellings allowed on a single lot is as follows… The number of dwelling units allowed on a lot in the Residential Multi-Family category is to be as allowed in Section 23.04.084 (Multi-Family Dwellings).*

CZLUO Section 23.04.084. Multi-Family Dwellings. *The number of multiple family dwellings (as defined by the Land Use Element, Chapter 7, Part I), allowed on a single lot or adjoining lots is based upon the "intensity factor" of the site. The intensity factor will be either low, medium, or high, based upon the type of street serving the site, the sewer service provided and the distance of the site from the central business district. The intensity factor determines the maximum number of units allowed, the maximum floor area for all units in the project and minimum areas for landscaping and pedestrian use. A multi-family project must satisfy the floor area and open area standards of this section, as well as all applicable requirements for parking, setbacks and height… In areas where the maximum number of units per acre is specified by planning area standards (Part II of the Land Use Element), the allowed intensity factor, maximum floor area and minimum open area shall correspond to the maximum units per acre as provided by subsection b. below.*

a. *Determining intensity factor: The intensity factor is the lowest obtained from any of the following criteria:*

	INTENSITY FACTOR		
	Low	Medium	High
Type of Road Access			
Unpaved Road	X		
Paved Local Street		X	
Paved Collector or Arterial[1]			X
Sewer Service			
On-site septic	X		
Community sewer			X
Distance[2] from Central Business District			
More than 1 mile	X		
One mile or less		X	
Less than 1,000 ft.			X

Notes: 1. Site access may be from a cross street where the site abuts a collector or arterial. 2. Straight-line distance.

b. *Determining allowable density: The allowable density, maximum floor area and minimum open area for a multiple-family site is to be shown in the following table (all area figures are expressed as* ***percentages of the total useable site area****). A minimum of 6,000 square feet of site area is required to establish more than one dwelling unit, pursuant to Section 23.04.044e(1) (Minimum Site Area - Multi-Family Dwellings): (emphasis added)*

INTENSITY FACTOR	MAXIMUM UNITS PER ACRE	MAXIMUM FLOOR AREA[1]	MINIMUM OPEN AREA[2]
Low	15	35%	55%
Medium	26	48%	45%
High	38	65%	40%

Notes: 1. The gross floor area of all residential structures, including upper stories, but not garages and carports. 2. Includes required setbacks, and all areas of the site except buildings and parking spaces.

Avila Beach Specific Plan Policy D.1 Residential Multi-Family (RMF) Density. *In order to preserve the community's character while providing increased residential opportunities in Avila Beach, such as in apartments and multi-family dwellings, allowable density shall be low density (up to 15 units to the acre). Increased densities of up to 38 units to the acre will be permitted if the following conditions are met:*

a. there would be no greater obstruction of public views and no greater limitation of solar access to adjacent properties than at 15 dwelling units per acre,

b. the bulk, massing and design character of the project would be consistent with that of the surrounding adjacent parcels, and

c. all other design guidelines and standard applicable to RMF development are met. These determinations will be made by the Planning Commission through the Development Plan review process.

Avila Beach Specific Plan Policy D.3. Residential Multi-Family (RMF) Allowable Building Heights. *In order to provide for roof variety, allowable building height shall be up to a maximum of 25', provided that one or more of the conditions below are met. All buildings may be 20' in height. A building may be up to 25' tall provided that: a.) it would result in no greater obstruction of public views and no greater limitation of solar access to adjacent properties than a 20 foot building. b.) the building has a pitched roof with a slope greater than 2.5 in 12, and the additional height above 20 feet is used to achieve this pitched roof. Height shall be measured as specified in the Coastal Zone Land Use Ordinance.*

Avila Beach Specific Plan Policy C.2. Commercial Retail District Standards (for Areas Not on Front Street) Front Setbacks. *All parcels in CR commercial areas shall have zero foot front setbacks or shall have front setbacks that are consistent with setbacks on nearby parcels.*

Avila Beach Specific Plan Policy C.5. Commercial Retail District Standards (for Areas Not on Front Street) Allowable Building Heights. *To prevent the development of a uniform wall of two story buildings, to help recreate the scale of single-story buildings which characterized old Avila, and to encourage variety in building heights, allowable building heights in the CR category shall be a maximum of 25' above the sidewalk of the main street frontage * (measured from the back of sidewalk), provided that one or more of the conditions below are met. All buildings may be 15' tall. A building maybe up to 25' tall if at least one of the following criteria are met:*

a. Unenclosed second story setback = 10 percent of parcel depth or 8 feet, whichever is greater.

b. Project is located on a corner lot.

c. Side setbacks = minimum of 10 feet total.

** Main street frontage means First Street or a side street between Front and First. If the building is located on a corner parcel, the main street shall be considered to be First Street.*

CZLUO Section 23.04.122. Measurement of Height. *The height of a building or structure is to be measured as the vertical distance from the highest point of the structure to the average of the highest and lowest points where the exterior walls would touch the natural grade level of the site; except that finished grade instead of natural grade shall be the basis for height measurement where:*

a. A site is graded or filled pursuant to approved subdivision improvement plans, or a grading permit that was approved to authorize: (1) Grading or fill to conform the elevation of the building site with that of adjoining developed sites; or (2) Fill to mitigate flood hazards pursuant to the provisions of Sections 23.07.060 et seq. of this title; or (3) Fill determined by the Environmental Coordinator and Planning Director to be necessary to mitigate the impacts of allowable development on archeological resources, which shall not exceed a depth of 24 inches unless specifically authorized by the Planning Director.

b. The site was graded or filled pursuant to a grading permit approved before September 18, 1986.

c. An adjustment (23.01.044) is approved by the Planning Director on the basis that the site was filled prior to 1959.

CZLUO Section 23.01.041(b)(5). Rules of Interpretation. Language. Rounding of Quantities. *Whenever this title requires consideration of distances, numbers of dwelling units, parking spaces or other aspects of development expressed in numerical quantities that are fractions of whole numbers, and this title uses such quantities in the form of whole numbers only, such numbers are to be rounded to the next highest whole number when the fraction is .5 or more, and to the next lowest whole number when the fraction is less than .5; provided, however, that quantities expressing areas of land are to be rounded only in the case of square footage, and are not to be rounded in the case of acreage.*

CZLUO Section 23.04.012(b). ***Applicability of Site Design Standards.*** *Where planning area standards (Part II of the Land Use Element) conflict with the standards of this chapter, the planning area standards prevail.*

CZLUO Section 23.04.021. Parcel Size Standards. *The minimum parcel size criteria of this Chapter are used to evaluate proposed land divisions to determine what parcel size may be appropriate in the specific case. …* ***For the purpose of determining whether existing or proposed parcels satisfy the standards of this chapter for the minimum***

parcel size, net site area (as defined in Chapter 23.11 as "Site Area, Net") is to be used in all cases…

CZLUO Section 23.11.030. Coastal Zone Land Use Ordinance Definitions

Site Area, Gross. *The total area of a legally created parcel (or contiguous parcels of land in single or joint ownership when used in combination for a building or permitted group of buildings) including any ultimate street right-of-way, existing rights-of-way deeded to the parcel, and all easements (except open space easements), across the site.*

Site Area, Useable. *Net Site Area minus any portions of the site that are precluded from building construction by natural features or hazards, such as areas subject to inundation by tides or the filling of reservoirs or lakes.*

Site Area, Net. *The gross site area minus any ultimate street rights-of-way and any easements (except open space easements) that limit the surface use of the site for building construction.*

The LCP also describes general visions and goals for the Avila Beach community, which are found in the LCP San Luis Bay Area Plan's Avila Beach Specific Plan. As stated there, the vision for Avila Beach is as follows:

The Avila Beach Specific Plan envisions Avila Beach as a fun, funky and eclectic place widely known for its weather, its beautiful, south-facing beach and its mix of shops and homes. The charming and quaint town will continue to be filled with people who value its serenity and isolation. The sun and sand will continue to attract many visitors, who will spend a day savoring snow cones and corn dogs in a comfortable, casual beach town. People will come to Avila to lie on the beach, throw a frisbee and take in the coastline. The small town will welcome its visitors with small retail shops oriented to meet beach and ocean needs.

In short, the LCP envisions Avila Beach as retaining its charm, which is expressly tied in many ways to the small scale nature of the community, including its built environment. The LCP Avila Beach Specific Plan's goals include explicitly to "preserve the funky and eclectic character of Avila Beach," including through a series of very specific design guidelines, many of which are applicable to this project, particularly related to density and project scale.

Appellants' Contentions

The Appellants contend that the County-approved project is inconsistent with the County's LCP because the project does not conform with the residential development standards related to density, floor area ratio (FAR), and open space; and is of a size and scope that will adversely impact the small town character of Avila Beach, including due to impacts on parking, affordability, and aesthetics. Specifically, the Appellants contend that the project does not conform to the residential development standards because the County incorrectly used the *total* square footage of the overall site, i.e. both the new hotel CR-designated parcel as well as the new condominium split-designated RMF/CR parcel, in order to calculate maximum allowed condominium density and FAR and minimum required open space requirements. The Appellants additionally contend that the project will adversely impact the community because: the project

provides inadequate parking; smaller condominium units would be more affordable; the hotel ramp will be constructed on a public sidewalk, and; the hotel lacks residential aesthetics.

Analysis

Subdivision

The County-approved project includes a subdivision of a 9,613-square-foot lot[4] to create one 3,596-square-foot lot and one 6,017-square-foot lot (see **Exhibit 7**), the latter of which would be comprised of four 1,150-square-foot airspace condominium parcels (all told resulting in six total parcels). When evaluating minimum parcel sizes for LCP consistency, the LCP requires the use of net site area, which requires that easements be subtracted from the total area.[5] (*See* CZLUO Section 23.04.021.) In this case, the 6,017-square-foot lot for the approved condominiums includes some 1,800 square feet of easement area (for a net site area of 4,217 square feet), and the 3,596-square-foot lot for the approved hotel includes some 800 square feet of easement area (see **page 2 of Exhibit 7**), for a net site area of 2,796 square feet. Thus, neither of the resultant lots meets the LCP-required minimum parcel size of 6,000 square feet of net site area (and even if there were no easements, the 3,596 square-foot CR-designated lot does not meet the minimum either). (*See* CZLUO Section 23.04.084.b.) Thus, the proposed subdivision would necessarily result in at least one substandard lot based on LCP minimum parcel size requirements, since given the size of the parent parcel (9,613 square feet) it is mathematically impossible to subdivide this area into two parcels which are a minimum of 6,000 square feet, as required by LCP policies CZLUO Sections 23.04.084.b, 23.04.029, and 23.04.028(a-c)).[6]

In addition, the subdivision includes further subdivision of the larger of the two created lots to create four additional airspace condominium parcels measuring 1,150 square feet each within the underlying "common" parcel. However, the minimum parcel size in the RMF category is 6,000 square feet, and condominium parcels smaller than 6,000 square feet can only be created consistent with the LCP if the condominium's "common ownership external parcel" meets the minimum parcel size (see CZLUO Section 23.04.028(d)). As discussed above, the larger of the two parcels (in terms of LCP measured minimum parcel size) has a net site area of 4,217 square feet, and minimum parcel size is determined by reference to net site area. (*See* again CZLUO Section 23.04.021.) Thus, the resultant 6,017-square-foot split-designated RMF/CR parcel (see

[4] The County's findings and conditions refer to one underlying property, but the County has also separately informed Commission staff that the County believes that there are actually two underlying legal parcels that make up the 9,613-square-foot property in question. Given that the County-approved project results in a re-subdivision (six resultant parcels, four of which are airspace condominium parcels), and these resultant parcels (rather than the parent parcels) drive the analysis of LCP consistency of the proposed project, the Commission can evaluate that resultant configuration and need not necessarily resolve the existing underlying lot configuration in order to evaluate the County's action here (except that it is worth noting that if there are two existing legal parcels, then they are both non-conforming as to minimum parcel size to start with per CZLUO Sections 23.04.029 and 23.04.028(a-c), but either way any re-subdivision needs to result in ultimate parcels which can be found consistent with minimum parcel sizes as required by the LCP).

[5] Per the LCP, net site area is "the gross site area minus any ultimate street rights-of-way and any easements (except open space easements) that limit the surface use of the site for building construction." (*See* CZLUO Section 23.11.030.)

[6] For CR-designated parcels, CZLUO Section 23.04.029 allows a reduction in minimum lot size for a commercial condominium or planned development with individual unit ownership. The approved hotel, however, does not meet these criteria.

page 1 of Exhibit 7) does not qualify for further subdivision, and thus the subdivision creating the airspace condominium units is also not allowed by the LCP.[7] In authorizing same, the County calculated the external parcel size based on the *total* square footage of *all* the property involved (i.e., the underlying 9,613 square-foot property), notwithstanding that the subdivision that would result in two separate parcels and the related fact that the 3,596-square-foot lot is designated entirely CR and would be used for the hotel (and thus, neither that parcel nor the proposed use of it contains any residential multi-family elements at all). The County's approach raises significant LCP interpretation concerns, potentially allowing improper, oversubscribed development standards within an area not designated or intended for implementation of such standards by allowing for "artificial inflation" of the baseline conditions or circumstances for allowing said development standards.

In other words, in determining the applicable ***residential*** development standards for the proposed project, the County incorrectly combined the total square footage of *both* the CR-designated and split-designated RMF/CR parcels for consideration. Thus, the County improperly included for determination of residential development standards a ***non***-residentially designated parcel. The condominium buildings themselves are not proposed to be situated on the CR-designated parcel, yet the County combined the square footage of the CR-designated parcel for determining the applicable development standards for the condominiums on the split-designated RMF/CR parcel. Furthermore, given that the proposed project really consists of two separate uses proposed on two separate sites that are designated for two different purposes – rather than constituting a true "mixed use" project on a single parcel – the parcels for these distinct uses should not be considered and conflated together when determining the development standards under the LCP that are applicable to each separate use/component.

Even assuming for the sake of argument that the LCP allowed for determination of minimum parcel size for purposes of allowing more than one dwelling unit for a multi-family dwelling by considering ***gross*** parcel size rather than net parcel size (the opposite is true, as discussed above), the County's approach of combining consideration of the square footage of both the CR-designated and split-designated RMF/CR parcels here to determine the minimum parcel size for the condominiums is erroneous. The County's approach appears to derive from the definition of "gross site area" in CZLUO Section 23.11.030, which states in relevant part: "The total area of a legally created parcel (or contiguous parcels of land in single or joint ownership when used in combination for a building or permitted group of buildings)… across the site." Thus, assuming that the underlying land at present is in fact two legal lots (*see* footnotes 1 and 3), it seems the County's thinking is that both the CR-designated and split-designated RMF/CR parcels should be considered together as "gross site area" because they are contiguous, legally-created parcels in common ownership used in combination for a permitted group of buildings per CZLUO section 23.11.030.

[7] Furthermore, approximately 1,400 square feet of the resultant split-designated RMF/CR lot on which the condominiums were approved would be zoned CR, and not RMF. Given that CR and RMF zonings are intended to serve fundamentally different land uses, the County's approval raises significant LCP consistency issues with respect to inclusion of non-RMF-designated land to meet the 6,000-square-foot minimum parcel size for allowing more than one dwelling unit for a residential multifamily dwelling per CZLUO Section 23.04.084.b (while acknowledging the resultant parcel here does not even meet the 6,000-square-foot minimum parcel size to begin with).

However, such an interpretation raises significant LCP consistency issues for the same reasons that the County's approach here improperly determined residential development standards based on consideration of a non-residentially-designated parcel. As previously mentioned, the proposed project here, though under cover of one CDP application, really comprises two distinct uses on two distinct parcels with two distinct zoning designations. The residential (condominium) component of the project is fully proposed on the split-designated RMF/CR parcel, the commercial (hotel) component of the project is fully proposed on the commercial (CR) parcel, and thus the two components of the project are, in a sense, fully severable, rather than comprising a true, integrated, non-severable "mixed use" project (*e.g.*, commercial use on the first floor, residential use on the second floor of a single building).

Thus, in this sense, the proposed hotel and condominiums, and underlying parcels are not really "used in combination for a building or permitted group of buildings" to appropriately be considered part of the same "gross site area" for purposes of CZLUO Section 23.11.030. The underlying concerns which the exclusively-designated CR parcel and the split-designated RMF/CR parcel are intended to respectively address would be undermined by combining the square footage of the exclusively-designated CR parcel for purposes of determining the applicable development standards for the residential use (condominiums) on the split-designated RMF/CR parcel (which is still mostly designated RMF).

The error of the County's approach can further be made clear by way of a contrasting example: if the two parcels at issue were both designated RMF and the proposed project was to construct residential condominium units in a single or connected structure, the Commission may not have LCP interpretation concerns with combining the net site area for both parcels for purposes of determining the applicable development standards. Although this example may not be the only such example of how combination of multiple lots for determining net site area may be justifiable, it provides contrast for why the County's approach is ***not*** justified.

Thus, the County-approved project creates more and smaller lots than the LCP allows, going directly to the heart of the Appellants' intensity and density of use arguments as this resultant lot configuration leads to the potential for *more* density and intensity than the LCP allows. As a result, the County's approval raises a substantial issue of conformance with the subdivision requirements of the LCP.

Density

With respect to allowable density, the County also calculated all of the allowable condominium density based off the *total* square footage of the underlying 9,613-square-foot property, again notwithstanding the subdivision and the fact that the newly created 3,596-square-foot CR lot is being used for the hotel, and again the fact that approximately 1,400 square feet of the 6,017-square-foot lot on which the condominiums are sited is actually located in CR and not RMF. However, the LCP requires such standards to be calculated based solely on the "Useable Site Area" [8] of the property being used for the intended use (i.e., multifamily residential dwellings),

[8] Per the LCP, useable site area equals net site area minus any portions of the site that are precluded from building construction by natural features or hazards, such as areas subject to inundation by tides or the filling of reservoirs or lakes. Because there are not any portions of the site that are precluded from building construction by natural features or hazards, useable site area is the same as net site area in this case.

in this case only the parcel with the condominiums on it.[9] (*See* CZLUO Section 23.04.084.b.) So, not only did the County evaluate allowable density based on the *total* square footage of the *entire* site (rather than just the split-designated RMF/CR parcel), it also applied *gross* site area to its calculations as opposed to *useable* site area as required by the LCP.

As described above, the condominium parcel is proposed to be 6,017 square feet, of which only 4,617 square feet are located in the RMF category that allows for the condominiums in the first place. Further, when net site area is used for this purpose, as directed by CZLUO Section 23.04.084(b), the area of easement (i.e., the parking, utility, drainage easement that applies to both created parcels) must first be subtracted, resulting in subtraction of about 1,800 square feet when the whole RMF/CR parcel on which the condominiums would be located is considered, and about 900 square feet when just the RMF portion of the parcel is considered, leading to a net site area of 4,217 for the full underlying newly created RMF/CR parcel, and 3,717 for just the RMF portion of the parcel.

The County found that the project qualifies for medium density, which means that up to three units would be allowed per the CZLUO based on a parcel size of 4,217 square feet, but only two units would be allowed by the CZLUO if only the 3,717-square-foot RMF portion of the site were countenanced.[10] Thus, even under consideration of useable site area most favorable to the Applicant (*i.e.*, useable site area for the entire condominium parcel, rather than just the RMF-designated portion), the CZLUO standards would only allow for three condominium units here. However, the Avila Beach Specific Plan, which governs in case of a difference with the CZLUO, allows only one unit on the site (whether 4,217 square feet or 3,717 square feet is used) based on the Specific Plan's allowance of only up to 15 units per acre "in order to preserve the community's character" (Avila Beach Specific Plan Policy D.1).[11] Increased densities are allowed by the Avila Beach Specific Plan, but only if, among other things, "all other design guidelines and standards applicable to RMF development are met," which as seen above in relation to the minimum parcel size for a multifamily dwelling (and as seen below in relation to maximum floor area, minimum open area, setbacks, height, and parking) they are not met. As a result, four condominium units are not allowed by the LCP, and the County's approval raises a substantial issue of conformance with the density requirements of the LCP.[12]

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[9] Since "useable site area" is defined in reference to "net site area," the discussion above regarding the impropriety of considering both the exclusively-designated CR and split-designated RMF/CR parcels for purposes of determining net site area equally applies in determining useable site area.

[10] These calculations were determined as follows: CZLUO Section 23.04.084.b specifies a density standard of 26 units per acre; 4,217 square feet for the entire condominium parcel equals 0.096809 acre. Thus, 3 units would be allowable (26 units/acre x 0.096809 acre = 2.5 units), rounding up as required per CZLUO Section 23.01.041(b)(5).); 3,717 square feet for only the RMF-zoned portion of the condominium parcel equals 0.08533058 acre. Thus, two units would be allowable (26 units/acre x 0.08533058 acre = 2.2 units), rounding down as required per CZLUO section 23.01.041(b)(5).

[11] These calculations were determined in the same manner as specified in footnote 8, except that 15 units per acre was substituted in place of 26 units/acre. Considering the entire useable site area of the condominium parcel, a maximum of 1 unit would be allowable (15 units/acre x 0.096809 acre = 1.45 units), rounding down as required per CZLUO Section 23.01.041(b)(5).

[12] Note that for the hotel component of the project, there is no specific explicit density requirement. Rather, CZLUO Section 23.08.262(c) states: "The density of a hotel or motel is not limited by this title except that a site for such use shall be designed to accommodate all proposed units while also satisfying all applicable height, setback, parking and

Maximum Floor Area and Minimum Open Area
CZLUO Section 23.04.084(b) identifies maximum allowable floor area and minimum required open area for RMF properties based on the total "Useable Site Area" (which in this case is the same as the net site area).[13] These kinds of development standards are intended to help "scale" development so that it does not inappropriately overwhelm sites or surrounding areas. For the condominium portion of the project, the LCP allows a maximum floor area of up to 48% for a medium-intensity project, which is what this project was deemed by the County.[14] When net site area is used for this purpose, as directed by CZLUO Section 23.04.084(b), the area of easement (i.e., the parking, utility, drainage easement that applies to both created parcels) must first be subtracted, resulting in subtracting about 1,800 square feet when the whole parcel is considered, and about 900 square feet when just the RMF portion is considered. When looking at net site area, the 48% maximum allowed floor area shrinks to just 2,024 square feet of floor area allowed by the LCP, and just 1,784 square feet when just the RMF portion of the site is considered.[15]

In this case, the County approved 4,614 square feet of floor area based on evaluating both the condominium parcel and the CR parcel, and not just the condominium parcel as is applicable, and also by using *gross* site area as opposed to *useable* site area as required by the LCP. As discussed above, neither of these approaches is LCP consistent. The County-approved 4,614 square feet of floor area is over twice what is allowed for a medium-intensity project when considering the net site area of the parcel on which the condominiums are located (and almost three times what is allowed when considering the net site area of just the RMF portion of the parcel). When compared against what a low-intensity project would allow under the LCP (i.e., 35% maximum allowed floor area, which is 1,476 square feet when considering the net site area of the whole condominium parcel and just 1,301 square feet when just the net site area of the RMF component is countenanced), the discrepancy is only greater.[16] The County-approved project would result in a significantly larger level of development scale and intensity than the LCP allows for the condominiums, and is thus inconsistent with the LCP in this regard. As a result, the County's approval raises a substantial issue of conformance with the maximum floor area requirements of the LCP.

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other standards of this title and the Land Use Element without the need for modification, adjustment or variance of such standards."

[13] The LCP does not provide specific explicit percentages for maximum allowable floor area and minimum required open area for CR properties.

[14] Arguably, because the density allowed via the Avila Beach Specific Plan is a maximum of 15 units per acre, as described above, the project should be only allowed up to low intensity factor per CZLUO Section 23.04.084 because low intensity is what equates to 15 units per acre. If considered low intensity, then the LCP allows a maximum floor area of up to 35%, not 48% for the condominium portion of the proposed project. However, this question need not be resolved in order to determine that because the approved project does not even meet the maximum floor area or minimum open space requirements for a medium-density multifamily residential dwelling.

[15] These calculations were determined as follows: For the entire 4,217-square-foot useable/net site area for the condominium parcel, 4,217sqft x .48 = 2,024 square feet; for only the 3,717-square-foot useable/net site area for the RMF-designated portion of the condominium parcel, 3,717 square feet x .48 = 1,784 square feet.

[16] See footnote 13. For the entire 4,217-square-foot useable/net site area for the condominium parcel, 4,217sqft x .35 = 1,476 square feet; for only the 3,717-square-foot useable/net site area for the RMF-designated portion of the condominium parcel, 3,717 square feet x .35 = 1,301 square feet.

Similarly, in terms of the minimum required open area for RMF properties, the LCP requires a minimum open area of 45% for a medium-intensity project (and 55% for a low-intensity project). When useable (here, same as net) site area is calculated as directed by the LCP, the minimum amount of required open area (*i.e.*, for a medium-density multifamily dwelling project) is 1,898 square feet when considering the useable/net site area of the full condominium parcel, and 1,673 square feet for the useable/net site area of just the RMF designated-portion of the condominium parcel.[17]

Here, although not explicitly identified by the County, it appears from the site plans that the County approved an open space area of approximately 2,700 square feet (when considering the whole parcel on which the condominiums are located), and about 1,300 square feet of open area when just looking at the RMF component. Although when considering the useable/net site area of the whole parcel, the LCP's open area requirement appears to be satisfied (2,700 square feet proposed v. 1,898 square feet required, at a minimum), it is not when considering just the net site area of the RMF component of the parcel (1,300 square feet proposed v. 1,673 square feet required, arguably).

Setbacks
The Avila Beach Specific Plan allows for a zero foot front setback for the hotel, but the County approved a project that extends into First Street by about five feet (not only for a handicapped access ramp, but also for upper story decks and related development). This is inconsistent with the LCP, and the County's approval raises a substantial issue of conformance with the front setback requirements of the LCP.

Parking
The LCP requires at least five off-street parking spaces for the three-unit hotel, and at least eight off-street parking spaces for the four-unit condominium (CZLUO Section 23.04.166(c)). The County approved five spaces for the hotel, but only approved six spaces for the condominiums.[18] This is inconsistent with the LCP, and the County's approval raises a substantial issue of conformance with the parking requirements of the LCP.

Height
Avila Beach Specific Plan Policy C.5 limits the allowable building height for the hotel in the CR category to a maximum of 15 feet, as measured from the sidewalk of the street frontage on First Street. Although that policy also allows exceptions to allow greater height, the hotel does not meet the exception tests (i.e., where there is an unenclosed second story setback equal to 10 percent of parcel depth or 8 feet, whichever is greater; where the project is located on a corner lot; and where side setbacks equal at least 10 feet). In addition, even if the project met the tests to allow up to 25 feet of height, the Specific Plan is clear that height for the hotel is measured from the sidewalk on First Street, and the County-approved project appears to be measured from

[17] For the entire 4,217-square-foot useable/net site area for the condominium parcel, 4,217 square feet x .45 = 1,898 square feet; for only the 3,717-square-foot useable/net site area for the RMF-zoned portion of the condominium parcel, 3,717 square feet x .45 = 1,673 square feet.

[18] The project plans also show a parking space on an adjacent property (see **page 2 of Exhibit 7**), but it is unclear what the County approved on this adjacent site, and how it relates to this project and its parking requirements.

average elevation (and the project materials are inconclusive as to whether that measurement was applied as directed by the CZLUO, even if it were the appropriate method of measurement here), which results in hotel heights that appears taller than even 25 feet. This is inconsistent with the LCP.

As to the condominiums, Avila Beach Specific Plan Policy D.3 limits the allowable building height to a maximum of 20 feet in the RMF category, but allows building heights up to 25 feet to allow for roof articulation, but only if the roof includes a pitch with a slope greater than 2.5 in 12. In this case, the Specific Plan indicates that height is measured as directed by the CZLUO (based on the vertical distance from the highest point of the structure to the average of the highest and lowest points where the exterior walls would touch the natural grade level of the site) as opposed to the manner in which the hotel height is governed by the LCP (*i.e.*, height for the hotel is measured from the sidewalk on First Street). As with the hotel component of the project, the project materials are inconclusive as to whether that measurement was applied as directed by the CZLUO, although the plans indicate compliance with a 25-foot height requirement (other than for elevator access, where the County also allowed an extra foot of height) – which is only allowable as part of roof articulation. However, it appears from the project materials that the condominiums also have flat roof components that would negate an allowable height above 20 feet in the first place. If so, the height of the condominiums above 20 feet is inconsistent with the LCP. Thus, for both the hotel and the condominiums, the County's approval raises a substantial issue of conformance with the height requirements of the LCP.

Community Character and Compatibility
CZLUO Section 23.02.034(c)(4)(iv) requires that the County not approve a development plan unless it first finds that the proposed project will not be inconsistent with the character of the immediate neighborhood. As discussed above, the County-approved project is inconsistent with LCP requirements associated with development density, intensity, and scale (with respect to minimum parcel size, maximum density, maximum floor area, and arguably minimum open area) than the LCP allows. The County also appears to have allowed reduced setbacks and parking requirements, and increased building heights, as compared to what the LCP would allow here. As a result, and based purely on these objective LCP requirements, the proposed development is inconsistent with the neighborhood character because it does not meet the underlying development standards applicable to the site. On the contrary, each LCP inconsistency allows only *more* development density, intensity, and scale than is allowed in the Avila Beach community by the LCP, including the Avila Beach Specific Plan. As a result, the Commission need not extend its analysis into more subjective community character evaluations, as the project is inconsistent with the LCP on this core and basic level already. As a result, the County's approval raises a substantial issue of conformance with the community character and compatibility requirements of the LCP.

Five Substantial Issue Factors
As explained above, the Commission has in the past decided whether the issues raised in a given case are "substantial" by the following five factors: the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

In this case, these five factors, considered together, support a conclusion that this project does raise a substantial issue of LCP conformance. Regarding the first factor, the County allowed a subdivision that does not meet minimum parcel size requirements, and further allowed airspace condominium lots that are below the minimum size allowed based on the combined size of the split-designated RMF/CR and CR-designated property, notwithstanding the different uses ascribed to each parcel (i.e., hotel and condominium). The County further applied gross site area (for both the RMF/CR-designated and CR-designated parcels) in it density, intensity, and scale of use and development calculations for the ***residential*** condominium component of the proposed project, as opposed to useable/net site area for just the RMF/CR-designated parcel), as is required by the LCP. The result is a project that is larger and more dense and intense than the LCP allows, incompatible with the community. In interpreting and applying the LCP, the County "artificially inflated" the baseline conditions for determining the development standards for the distinct, residential portion of the project site by also considering a distinct, non-residential portion of the broader project site. Such an interpretation could easily result in exploitation of the LCP to inappropriately oversubscribe development standards for a development proposal. In short, there is a very low degree of factual or legal support for the County's decision, considering LCP requirements.

Regarding the second factor, the County's approval authorizes an unallowable subdivision and larger and more dense/intense development than is allowed by the LCP. This again results in a project significantly out of character with small town character of Avila Beach. Although the extent and scope of development approved (four condominiums and a three-room hotel) may not be that significant in absolute terms, the extent and scope of development ***is*** significant relative to the project site and development standards applicable to the project site.

Regarding the third factor, again, in absolute terms approval of a four condominium unit development and a three-unit hotel could be argued to be not that significant; however, relative to the location and the site, and the applicable development standards as they relate to Avila Beach and its protected character community character, the project affects a significant and protected coastal resource. This conclusion is supported by the fact that an Avila Beach Specific Plan exists which specifies more specific development standards for this site/area than the rest of the LCP.

Regarding the fourth factor, the County's approval would create an adverse precedent for future interpretation of the LCP because the County clearly misinterpreted the LCP standards for creating parcels, and miscalculated the allowable density, intensity, and scale of allowed here (such as for minimum parcel size, maximum floor area, minimum open area, minimum setbacks, maximum height, minimum parking, etc.). Continued misinterpretation and misapplication of these LCP development standards will result significant adverse impacts with respect to community character.

Finally, regarding the fifth factor, the approved project raises issues of potential regional or statewide significance because of the manner in which the County has misinterpreted the applicable LCP standards. As discussed in the fourth factor above, such methodology could lead to future projects throughout the County that are greatly oversubscribed for their site and surrounding area, which could have a significant regional impact in the County's coastal zone These five factors when taken together raise substantial conformance issues with respect to the

LCP's design standards.

Substantial Issue Conclusion

The County's CDP action raises substantial LCP conformance issues. The primary issue with the County's approval here is that the overall property involved is 9,613 square feet, and the LCP's minimum parcel size for subdivision in both the CR and RMF land use categories is 6,000 square feet (see CZLUO Sections 23.04.029 and 23.04.028(a-c)). Thus, the property cannot be divided into even two new parcels to begin with because at least one parcel cannot meet minimum parcel size requirements. And exacerbating that LCP consistency problem, the County here also then relied on the entire 9,613-square-foot underlying property to identify the appropriate allowable level of development density, intensity, and scale for the ***condominium*** portion of the project when the LCP is appropriately interpreted such that all such determinations be made based on the underlying property being put to the approved use, in this case the one newly created split-designated RMF/CR parcel on which the condominiums would be located. In addition, whereas the LCP requires the use of useable/net site area for such development standards determinations, the County applied gross site area (again, for both the RMF/CR split-designated and CR-designated parcels, rather than just the RMF/CR split-designated parcel) in its calculations, thus allowing greater development density, intensity, and scale (with respect to minimum parcel size, maximum density, maximum floor area, and minimum open area) than the LCP allows. The County also appears to have allowed reduced setbacks and parking requirements, and increased building heights, as compared to what the LCP would allow here. As a result, the County-approved project greatly oversubscribes the density, intensity, and scale of development for the underlying site, inconsistent with not only these specific LCP requirements, but also with LCP requirements that protect the character of Avila Beach, including through the LCP's Avila Beach Specific Plan. The Commission therefore finds that a substantial issue exists with respect to the County-approved project's conformance with the provisions of the certified San Luis Obispo County LCP, and takes jurisdiction over the CDP application for the project.

G. 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.

CDP Analysis and Conclusion

As described in the "Substantial Issue Determination" section above, the proposed project is significantly out of conformance with the LCP. Given the degree of LCP inconsistencies, and the range of potential alternatives that the Applicant may want to consider to address same, including the ways in which development on the site might best be accommodated consistent with the LCP, the Commission does not here identify conditions to make an LCP-consistent project in this case, rather the proposed project is denied due to these LCP inconsistencies. Such denial will allow the Applicant to go back and work through the local process using the correct LCP standards to develop a project, where that project can be vetted locally, including allowing input from the interested public and decision makers, as opposed to the Commission dictating a project that the Applicant has not proposed and that has not had that local public participation.

Takings

In addition to evaluating the proposed development for consistency with the certified LCP, 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, the Commission 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 result in a taking of private property, because the takings claim is not yet ripe, and because the Applicant already enjoys economic uses on the property.

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."[19] 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

[19] 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).

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 Unites 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 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."[20]).

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*

[20] 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).

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'" (*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).

A Regulatory Taking Claim is Premature

Here, although the current project proposal is denied, any takings claim made with respect to denial of this project proposal would be premature. Through this report, the Commission has provided guidance for the Applicant (and the County) to consider if it seeks to resubmit another project proposal that is fully consistent with applicable LCP standards. Until the Applicant submits a reduced, scaled-down development proposal consistent with the LCP provisions as discussed in this report, it is the Commission's position that any claim of takings would be premature because the Commission has not yet had an opportunity to evaluate a project proposal that has been redesigned to be responsive to the concerns raised in this report and to be consistent with the LCP. In other words, Commission denial here does not stand for the premise that ***no*** new proposal is allowed on the project site, but rather that ***this*** project proposal is not allowable on the project site due to identified LCP inconsistencies, which can be redressed.

In sum, the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with the LCP's development polices and standards, would not result in an unconstitutional taking. Although the regulations require denial of the proposed project at this time, the Applicant owns the underlying parcels which contain three existing single-family residences (thus evincing an economically beneficial use of the property), and may return to the County to apply for a similar but scaled-down project on the current site under consideration that adheres to the LCP's requirements. Any takings claim as a result of the current denial would therefore be premature.

H. 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 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 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.