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STAFF REPORT: CDP HEARING

Application Number: 3-18-1039

Applicants: Tiffany and Jeremy Cieslak

Project Location: 1635 Sunset Drive, in the Asilomar Dunes neighborhood of Pacific Grove, Monterey County (APN 007-041-020-000).

Project Description: Construction of a 2,942-square-foot two-story single-family residence with attached garage, driveway, patios, and landscape restoration on a 23,137-square-foot vacant parcel.

Staff Recommendation: Denial.

STAFF NOTE

This coastal development permit (CDP) is before the Commission for a July hearing because the Applicants have asserted that the project is required to be deemed approved by the provisions of the Permit Streamlining Act (PSA). Specifically, the application was filed as complete on November 21, 2018, and the deadline for Commission action under the PSA based on that filing date was May 20, 2019 (i.e., 180 days from filing). Pursuant to PSA requirements, the Applicants gave the Commission and interested parties notice on June 5, 2019 that they were pursuing the 'deemed approved' protocol afforded the Applicants under the PSA. Based on those PSA provisions, the Commission has 60 days from the day it received the notice to take an action on the application or it will be deemed approved under the PSA (i.e., by August 5, 2019). This identified PSA issue does not in any way impact the ability of the Commission to exercise its discretion under the Coastal Act to approve or deny the CDP application depending on whether it finds the proposal consistent with the Act or not, but it does require the Commission to take

action on the CDP application at this hearing to avoid ‘deemed approval’ of the CDP application by operation of law.

Staff notes that the reason that this application had not been brought to the Commission by the 180-day PSA action deadline is because the project raises a significant coastal resource issues related to development in the Asilomar Dunes area specifically, and the adequacy of services (in this case water supply) more generally, when those issues are also critical with respect to the City of Pacific Grove’s proposed Local Coastal Program (LCP) (i.e., the City does not have a certified LCP). As explained further in this report, staff believed that bringing this application forward when that LCP was about to be heard by the Commission (and indeed the City’s proposed LCP is scheduled for action at the same Coastal Commission July meeting in San Luis Obispo as is this application) would prejudice approval of the LCP when that is not allowed by the Coastal Act. The Applicants refused to allow for the 90-day PSA extension to allow for the LCP to be approved with updated, more consistent residential standards applicable to the Asilomar Dunes residential area prior to consideration of this CDP application. Thereafter, the Applicants notified the Commission that the project would be required to be ‘deemed approved’ per the PSA, subject to the 60-day extension for the Commission to take action, and staff set the matter for hearing accordingly (i.e., the application before the Commission today).

SUMMARY OF STAFF RECOMMENDATION

The Applicants request a CDP for the construction of a new residence and attached garage with 2,942 square feet of gross floor area that would cover approximately 3,093 square feet of sandy dune. The proposed development also includes construction of a new driveway and a courtyard on sandy dune, electrical and sewer connections underground, and native habitat restoration. As indicated above, the City does not have a certified LCP, but does have a certified Land Use Plan (LUP) (which can be applied as non-binding guidance) and thus the standard of review is Chapter 3 of the Coastal Act.

The Asilomar Dunes area has long been considered by the Commission to be an environmentally sensitive habitat area (ESHA) because it includes plant and animal life and related habitats that are rare, especially valuable, and easily disturbed and degraded by human activities and developments. The Applicants’ parcel is no different, is comprised of this same dune habitat mix, and is ESHA in this case as well. The Commission has a long history of protecting the Asilomar Dunes system ESHA, including through development and application of guiding LUP policies that strike a balance between maximizing dune and related habitat protection and accommodating reasonable residential use on pre-existing subdivided parcels in a takings context.

Specifically, the Commission’s Asilomar Dunes program has been structured for years as a methodology to protect dune resources as much as possible while still allowing some development in order to avoid an unconstitutional takings of private property. To do so, the Commission, as identified in the LUP, limits total sandy dune ESHA lot coverage to a maximum of 15 percent of the lot area for lots of the size at issue here (i.e., over one-half acre), and also allows for up to an additional 5 percent of the lot area for “immediate outdoor living area” that can be used for residential activities in the sand dunes, but not otherwise covered with impervious surfaces (with structures, patios, etc.). For the remainder of the site, the Commission

requires dune ESHA habitat restoration and preservation, including through required conservation easements, as well as offsite restoration to offset impacts of such residential development in ESHA. It is only by meeting these requirements that the Commission has allowed residential development, such as that proposed here, in dune ESHA under the Coastal Act.

The project site is an undeveloped 23,137 square-foot parcel and is a mix of sand dune and Monterey pine forest habitats. In total, the Applicants propose 5,262 square feet of residential development coverage, which is 23% percent of the project site (as calculated per the LUP) and substantially inconsistent with the maximum 15 percent coverage limitation applied by the Commission (and in the certified LUP), which does not even take into account the 900 square feet of driveway that is within the front yard setback (for which the LUP guidance would suggest that it not count toward coverage) and the 220 square-foot area that the Applicants deem 'outdoor living space' that is in fact completely surrounded by the proposed residential structure and cutoff from the dunes themselves rendering them de facto dune coverage as well, for a total direct loss of dunes for the site that reaches 27%. Staff does not believe that the amount of ESHA impacts associated with the proposed project can be found Coastal Act consistent in a taking context, including based on the Commission's long and consistent history related to same in these dunes.

In addition to this primary dune ESHA inconsistency, the proposed project also raises other inconsistency issues. Specifically, the Applicants lack a water source, and in fact there is no available water to serve new residential development in the Asilomar Dunes at the current time due to scarcity of water supply on the Monterey peninsula. The proposed project is thus inconsistent with the Coastal Act's public services provisions. In addition, the proposed project is located in a visually sensitive dune area with significant and protected public views. Despite that context, the proposed project is two stories, leading to public view degradation, including when the LUP and the Commission's actions in the past don't allow two stories at this location, inconsistent with the Coastal Act's public view protection provisions.

One option available to the Commission in light of these Coastal Act inconsistencies is to condition the project to make it consistent on these points. However, the proposed project here is *substantially* inconsistent on these points (and inconsistent with the guiding LUP policies); would require a complete redesign to make it consistent in relation to dune ESHA and public views; and can't be made consistent in the short term due to a lack of water. Staff does not believe it appropriate for the Commission to attempt such a major redesign, nor a demonstration of adequate water condition in this case, and denial of the CDP for the proposed project is warranted to allow the City of Pacific Grove and the Commission an opportunity to review any subsequent redesigned project for Coastal Act (or LCP, if certified by then) consistency.

Moreover, staff believes that the existing LUP standards themselves are not fully consistent with the Coastal Act requirements that compel *maximum* protection of ESHA and the *minimum* residential development necessary to avoid an unconstitutional taking of private property. In fact, the existing LUP includes various loopholes and exemptions (such as the driveway exemption), which, after nearly 40 years of experience permitting development in the Asilomar Dunes, staff has concluded are not consistent with Coastal Act requirements with respect to ESHA protections. On these points, the currently pending City of Pacific

Grove LCP (again, also scheduled for the July meeting in San Luis Obispo) includes modifications to these standards that refine how residential development in these dunes might be allowed, including in different ways than the Commission has applied in the past. In addition, the City's proposed LCP includes differing public view protection standards, and includes a requirement that development be served by an available and sustainable water supply. Staff has prepared a recommendation for approval of the City's proposed LCP, where the City's proposal and the accompanying suggested modifications address the very issues that are the subject of this CDP application in refined ways, and the LCP is scheduled for Commission consideration at the same meeting as the recommendation on this CDP application. Taking an action on this CDP at this juncture, including based on the existing LUP as guidance, may prejudice consideration of the LCP, which is not allowed by the Coastal Act. Thus denial of the CDP for the proposed development is warranted for these reasons as well.

In summary, the proposed project is substantially inconsistent with the guiding LUP policies, and with ESHA protection, public view protection, and public service requirements of the Coastal Act, and taking an action on the proposed development would prejudice consideration of the City's proposed LCP currently before the Commission. Therefore, the project cannot be found consistent with the Coastal Act, and staff recommends **denial** of the CDP. The motion to act on this recommendation is found on page 5 below.

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EXHIBITS

- Exhibit 1 – Regional Location Maps
- Exhibit 2 – Aerial Photo of Project Site
- Exhibit 3 – Assessor’s Parcel Map
- Exhibit 4 – Photos of Project Site
- Exhibit 5 – Project Plans
- Exhibit 6 – Pacific Grove LUP Land Habitat Sensitivity and Shoreline Access Map
- Exhibit 7 – Pacific Grove Architectural Permit AP17-132 (Mitigation & Monitoring Plan)

APPENDICES

- Appendix A – Substantive File Documents
- Appendix B – Staff Contact with Agencies and Groups

I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in denial of the CDP as conditioned 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 **deny** Coastal Development Permit Number 3-18-1039 pursuant to the staff recommendation, and I recommend a **yes** vote.*

***Resolution to Approve CDP:** The Commission hereby denies Coastal Development Permit Number 3-18-1039 and adopts the findings set forth below on grounds that the development as conditioned will not be in conformity with the policies of Chapter 3 of the Coastal Act. 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

A. PROJECT DESCRIPTION

Project Location

The proposed project is located at 1635 Sunset Drive in the Asilomar Dunes neighborhood of the City of Pacific Grove. The Asilomar Dunes neighborhood is mapped as the area bounded by Lighthouse Avenue, Asilomar Avenue, and the northern boundary of Asilomar State Park to the south, and is located in the Asilomar Dunes complex extending from Point Pinos at the Lighthouse Reservation in Pacific Grove through Spanish Bay and to Fan Shell Beach in the downcoast Del Monte Forest area (see **Exhibit 1** for regional location maps, **Exhibit 2** for an aerial photo of the project site, and **Exhibit 3** for the Assessor's Parcel Map).

The Applicants' parcel is located in an area zoned by the City as R-1-B-4, Single-Family Low-Density Residential.¹ Development within the surrounding area is characterized by one- and two-story single-family dwellings interspersed in the dunes. This low-density zoning and development on relatively large lots is part of what gives this Asilomar Dunes residential area its open-space character. In this case, the lot is 23,137 square feet, or 0.53 acres, and is currently undeveloped (see **Exhibit 4** for photos of the project site). The rectangular site is relatively narrow and long, extending from Sunset Drive inland approximately 323 feet. The site can be

¹ The City's zoning has not been certified by the Commission as part of an LCP, and the is not applicable in a Coastal Act review.

categorized into three distinct terrace steps that rise in elevation from front to back. The first two steps consist of sand dune habitat, with the final step forming the beginning of the Monterey pine forest front zone. The understory of the first step consists of native dune sedge and coyote brush interspersed with non-native grasses, the second step is similar with a higher concentration of exotic species, and the third step includes several large mature Monterey pines.

As discussed below, the entire site is an environmentally sensitive habitat area (ESHA), as are all lots within dune habitat located in the Asilomar Dunes. This is due in part to the existence of up to ten plant species and one animal species of special concern that are found naturally within the harsh conditions of the Asilomar Dunes system. Increasing development pressure has reduced the amount of available habitat and thus the range of these species. The subject lot is directly adjacent to other lots that have homes that were built prior to the permitting requirements of the Coastal Act (i.e., before January 1, 1977) and include nonnative and invasive landscaping; however, several properties on this block have also been redeveloped since 1977 (thus, subject to Coastal Act permitting requirements) and the areas outside the development envelopes on those properties have been restored and replanted with appropriate native plant species, which the Coastal Commission has required for all new residential development in the Asilomar Dunes on the basis of Coastal Act ESHA protection policies. The site is also located within a highly sensitive archaeological area.

Project Description

The proposed project includes construction of a new residence and attached garage with 2,942 square feet of gross floor area that would cover approximately 3,093 square feet of sandy dune ESHA. The project also includes a 12-foot wide driveway within the 75-foot front yard setback (900 square feet), additional driveway space that consists of two 3-foot wide permeable paving strips (906 square feet) with a strip of sand in the middle (approximately 207 square feet), a courtyard area located in the center of the home that is completely separated from other dune areas and would be covered with permeable materials (220 square feet), and a concrete patio walkway around the courtyard area (378 square feet). Additionally, although the foundation of the house is built directly atop 3,093 square feet of dune, the first-floor is cantilevered out directly approximately 5 feet over the dunes, covering an additional 458 square feet of dune space. In total, the project proposes to cover approximately 5,262 or 23 percent of the 23,137-square-foot project site. This does not include a 900-square-foot area of driveway located within the 75-foot front yard setback. Driveway components that are located within the 75-foot front setback area are not considered in coverage calculations under the 1989 LUP.² Specifically, a 12-foot-wide portion of the driveway within the 75-foot front yard setback may be excluded from the coverage calculation if the entire driveway is comprised of pervious or semi-pervious materials. Thus, the project actually proposes to cover 6,162 square feet (27%) of dune habitat, but under the 1989 LUP, 900 square feet of area is excluded from the coverage calculation (see project plans attached as **Exhibit 5**).

The proposal also includes installation of underground electrical utilities and sewer connections from the public sewer line, which would both be located under the proposed driveway. The project also includes restoration of the remaining portions of the property (i.e., the portions of the

² As will be explained further below, the 1989 is not actually the standard of review for this project, but is considered as guidance.

property that are not part of the above-described residential building area) to its native dune and pine forest condition. One Monterey pine would need to be removed to accommodate the project. All other existing Monterey pines would be retained and protected during construction. The habitat restoration plan calls for planting ten to fifteen additional Monterey pines. Finally, the Applicants have incorporated various mitigations required by the City through the CEQA process into the project (see **Exhibit 7**). These mitigations address biological issues, such as monitoring during construction activities, as well as archeological resource issues. These incorporated components are considered part of the proposed project.

B. STANDARD OF REVIEW

The Asilomar Dunes portion of the City of Pacific Grove is located within the coastal zone, but the City does not have a certified LCP. The City of Pacific Grove has submitted an LUP update (to the 1989 LUP) and brand new IP proposal to the Commission for consideration to fully certify a City LCP for the first time. Commission staff has prepared a recommendation to approve the LCP submittal with suggested modifications for Commission action, which is scheduled for the same meeting as the recommendation on this CDP application. Staff has recommended suggested modifications to the LCP with regard to residential development in the Asilomar Dunes, which is the subject of this CDP application, because staff has determined that the 1989 LUP Asilomar Dunes standards are not fully consistent with the Coastal Act ESHA protection requirements and do not adequately reflect current understandings of Coastal Act requirements with respect to ESHA protections (as clarified by recent caselaw).

Because the City does not yet have a certified LCP, applicants for coastal zone development must apply to the Coastal Commission directly for CDPs and the standard of review is the Coastal Act. Although the Commission is set to act on the City's proposed LCP at the July meeting in San Luis Obispo, the existing 1989 LUP is the document that currently provides non-binding guidance during the review of such applications unless and until the LCP currently before the Commission is certified.³

C. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

Applicable Policies

Coastal Act Section 30240, states:

Section 30240 Environmentally sensitive habitat areas; adjacent developments

(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

³ Certification of the LCP (as recommended by staff) is a multi-step process which requires: the Commission to approve the LCP as recommended by staff; the City to accept the Commission's approval, including any suggested modifications; and the Commission's Executive Director to certify the City's acceptance (see generally Title 14 of the California Code of Regulations (CCR) Sections 13542-44).

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.

The Coastal Act, in Section 30107.5, defines an environmentally sensitive area as

***Section 30107.5**...any area 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.*

As indicated previously, while Coastal Act policies are the standard of review for CDPs here, until the City has a certified LCP in place the City's certified LUP provides guidance to the Commission as it considers proposals for development in the Asilomar Dunes neighborhood. With regards to ESHA, the LUP contains various policies designed to protect the acknowledged dune ESHA of the Asilomar Dunes area:

***LUP Policy 2.3.5.1.** New development in the Asilomar dunes area (bounded by Asilomar Avenue, Lighthouse Avenue, and the boundary of Asilomar State Park) shall be sited to protect existing and restorable native dune plant habitats, as well as the native oaks and pine forest which stabilize the inland edge of the high dunes... **No development on a parcel containing ESHA shall be approved unless the City is able to find that, as a result of the various protective measures applied, no significant disruption of such habitat will occur.** [emphasis added]*

***LUP Policy 2.3.5.1.c.** During construction of new development, habitat areas containing Menzies' wallflowers or Tidestrom's lupine or other rare and endangered species shall be protected from disturbance. Temporary wire mesh fencing shall be placed around the habitat prior to construction and the protected area shall not be used by workers or machinery for storage of materials. Compliance inspection(s) will be made during the construction phase.*

***LUP Policy 2.3.5.1.e.** If an approved development will disturb dune habitat supporting or potentially supporting Menzies' wallflower, Tidestrom's lupine or other rare or endangered species, or the forest front zone along Asilomar Avenue south of Pico Avenue, that portion of the property beyond the approved building site and outdoor living space (as provided in section 3.4.5.2) shall be protected by a written agreement, deed restrictions or conservation easement granted to an appropriate public agency or conservation foundation. These shall include provisions which guarantee maintenance of remaining dune habitat in a natural state, provide for restoration of native dune plants under an approved landscape plan, provide for long-term monitoring of rare and endangered plants and maintenance of supporting dune or forest habitat, and restrict fencing to that which would not impact public views or free passage of native wildlife. Easements, agreements or deed restrictions shall be approved prior to commencement of construction and recorded prior to sale or occupancy.*

***LUP Policy 2.3.5.1.g.** Utility connections shall be installed in a single corridor if possible, and should avoid surface disturbance of areas under conservation easement.*

LUP Policy 3.4.4.1. All new development shall be controlled as necessary to ensure protection of coastal scenic values and maximum possible preservation of sand dunes and the habitat of rare and endangered plants.

LUP Section 3.4.5.2 specifies the maximum aggregate lot coverage allowed for new development in the Asilomar Dunes area as follows:

LUP Policy 3.4.5.2. Maximum aggregate lot coverage for new development in the R-1-B-4 zoning districts is 15% of the total lot area. For purposes of calculating lot coverage under this policy, residential buildings, driveways, patios, decks (except decks designed not to interfere with passage of water and light to dune surface below) and any other features that eliminate potential native plant habitat will be counted. However, a driveway area up to 12 feet in width the length of the front setback shall not be considered as coverage if surfaced by a material approved by the Site Plan Review Committee. An additional 5% may be used for immediate outdoor living space, if left in a natural condition, or landscaped so as to avoid impervious surfaces, and need not be included in the conservation easement required by Section 2.3.5.1(e). Buried features, such as septic systems and utility connections that are consistent with the restoration and maintenance of native plant habitats, need not be counted as coverage.

The siting of each new development and the expected area of disturbance around each residence shall be individually reviewed by the Site Plan Review Committee. Such review shall duly consider the minimization of dune destabilization and disturbance to endangered plants and their habitat.

In special cases, up to 20% aggregate lot coverage may be allowed as a conditional use if the City specifically finds that:

- a) An offsetting area of native dune plant habitat will be restored and maintained adjacent to the site, such that the total area which will be preserved, restored and permanently maintained under conservation easement or similar enforceable legal instrument, as provided in Section 2.3.5.1, is equal to at least 80% of the total area of applicant's lot; and,*
- b) The additional site coverage is essential for protecting public views (i.e., by maximizing front setback in the case of parcels facing Sunset Drive), or for avoiding hardships in the case of existing parcels of one-half acre or less which would otherwise suffer in comparison to adjacent similarly-sized developed parcels.*

Asilomar Dunes Resources

Coastal sand dunes constitute one of the most geographically constrained habitats in California. They only form in certain conditions of sand supply in tandem with wind energy and direction. Dunes are a dynamic habitat subject to extremes of physical disturbance, drying, and salt spray, and support a unique suite of plant and animal species adapted to such harsh conditions. Many characteristic dune species are becoming increasingly uncommon. Even where degraded by human activities and development, the Coastal Commission has in the past found this important and vulnerable habitat to be ESHA due to the rarity of the physical habitat and its important

ecosystem functions, including that of supporting sensitive species.

The proposed development is located in the Asilomar Dunes complex, which considering the above, is an environmentally sensitive habitat area extending several miles along the northwestern edge of the Monterey Peninsula. The Asilomar Dunes complex extends from Point Pinos at the Lighthouse Reservation in Pacific Grove through Spanish Bay and to Fan Shell Beach in the downcoast Del Monte Forest area. Within Pacific Grove, this dunes complex extends through two protected areas, the Lighthouse Reservation area and Asilomar Dunes State Park, which sandwich a dune-residential community. Although this dune-residential area is often described as Asilomar Dunes more broadly, it is only a part of the larger Asilomar Dunes complex.⁴

The Asilomar Dunes extend inland from the shoreline dunes and bluffs through a series of dune ridges and inter-dune swales to the edge of more urban development in some cases and the edge of the native Monterey pine forest in others. The unusually pure, white quartz sand in this area was formerly stabilized by a unique indigenous dune flora. However, only a few acres of the original habitat area, which spans almost five miles of shoreline and includes the Asilomar residential neighborhood in Pacific Grove, remain in a natural state. The balance of the original habitat has been lost or severely damaged by sand mining, residential development, golf course development, trampling by pedestrians, and the encroachment of non-indigenous introduced vegetation. While a number of preservation and restoration efforts have been undertaken (most notably at the Spanish Bay Resort, Asilomar State Beach, and in connection with previously approved residential developments on private lots), much of the Asilomar Dunes complex remains in a degraded state due to the aforementioned human activities and development. Even so, it remains a valuable habitat area because it supports certain rare and/or endangered plants and animals that are characteristic of this environmentally sensitive and rare habitat.

The Asilomar Dunes complex includes up to ten plant species and one animal species of special concern that have evolved and adapted to the desiccating, salt-laden winds and nutrient poor soils of the Asilomar Dunes area. The best known of these native dune plants are the Menzie's wallflower, Monterey spineflower and the Tidestrom's lupine, which all have been reduced to very low population levels through habitat loss and are Federally-listed endangered species. Additionally, the native dune vegetation in the Asilomar Dunes includes other dune species that play a special role in the ecosystem; for example, the bush lupine, which provides shelter for the rare black legless lizard, and the coast buckwheat, which hosts the endangered Smith's blue butterfly. Native Monterey pine trees that comprise the forest-front, an area where the central dune scrub plant community intersects the native Monterey pine forest community, serve to minimize environmental stresses to the interior trees of the forest, reduce tree failures that result when trees are more directly exposed to wind, and are considered critical in maintaining the stability of the landward extent of the sand dunes. Because of these unique biological and geological characteristics of the Asilomar Dunes, the Commission has a long history of identifying all properties in the Asilomar Dunes area with these dune system features, both in the City of Pacific Grove and Monterey County, as being located within ESHA. Based on this understanding, the Pacific Grove LUP certified by the Commission includes a variety of policies,

⁴ The Pacific Grove Asilomar Dunes dune-residential area is located between Lighthouse Avenue and State Parks' Asilomar Conference Grounds, and between inland Asilomar Avenue and the Asilomar State Beach shoreline.

relevant policies which are cited above, to protect this identified dune ESHA.

Site Specific Resources

At the time of LUP development, the City of Pacific Grove conducted a survey of existing dune resources on each parcel. At that time (1990), the applicants' parcel was identified and characterized as coastal bluffs/meadows with moderate sensitivity (see **Exhibit 6**). A botanical survey report prepared for the site (by coastal biologist Thomas K. Moss on February 4, 2017) states that the property can best be described as a mix of degraded sand dune habitat with Monterey pine forest front at the back of the lot. Exotic plants and aggressive invasive species, such as ice plant and pampas grass, can be found throughout the project site. Native species, including dune sedge, coyote brush and Monterey pines, are also found on site. No individual occurrences of sensitive plant species were found, but the report concludes that the site could support sensitive dune plants. The report also noted that a cursory search of the property was conducted for black legless lizards and two individual lizards were found. The black legless lizard is listed on the California Department of Fish and Wildlife's "Species of Special Concern."

Commission staff has visited the site and confirmed that the site contains dune habitat, albeit degraded with non-native plants in some areas, as well as Monterey pine forest. Therefore, based upon the presence of dune and forest habitat, the potential for special status plant species, the presence of black legless lizards (all of which can be easily disturbed or degraded by human activities and development), and consistent with the City's LUP and prior Commission actions on other proposed development in the Asilomar Dunes, the Commission finds that the site is environmentally sensitive habitat as defined by Section 30107.5 of the Coastal Act (ESHA).

Project Impacts

The proposed project will impact the dune ESHA on the site in two ways: (1) it will provide for a new long-term residential development and use in dune ESHA, and (2) it will contribute to the cumulative loss of the Asilomar Dunes system. Nonetheless, to avoid an unconstitutional taking of private property, the Commission must allow some level of beneficial economic use of the applicants' property consistent with investment-backed expectations, considering the fact that the Applicants' entire property is located within ESHA (for which the Coastal Act otherwise limits development to only resource-dependent uses). This concern of avoiding an unconstitutional taking of private property with respect to development proposals within the Asilomar Dunes residential area is reflected in the development standards set forth in the 1989 certified LUP.

Residential Use in ESHA

The residential zoning of the existing parcel pre-dates the Coastal Act, including Section 30240, the purpose of which is to protect environmentally sensitive habitat areas. The Coastal Act does not allow residential uses in ESHA, absent a need to comply with Section 30010 by avoiding an unconstitutional taking of private property. Although landowners have no vested right in existing or anticipated zoning,⁵ in implementing the Coastal Act the Commission is sensitive to land use decisions and circumstances which predate enactment of the Act, as well as other relevant legal considerations such as constitutional property rights. Notwithstanding takings considerations,

⁵ See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 796.

construction of a single-family dwelling within ESHA is incompatible with the requirements of Coastal Act Section 30240, which expressly states that “only uses dependent on [ESHA] resources shall be allowed within those areas,” and residential use is not resource-dependent. Still, considering that the Asilomar neighborhood was subdivided prior to passage of the Coastal Act; that the R-1-B-4 zoning designation of the Applicants’ property specifically allows for a single-family low-density residential dwelling (even if not under the Coastal Act); and further considering that the Commission must allow *some* level of economically-beneficial use of the Applicants’ property consistent with investment-backed expectations to avoid an unconstitutional taking of private property without compensation, the Commission recognizes that approval of a single-family dwelling (as proposed here) could achieve the resource-protection policies underlying Section 30240 of the Coastal Act as much as possible while still allowing for residential development as contemplated by the parcel’s zoning.

As proposed, the project will result in a new structure and associated residential development on the site. Although the application has not specifically addressed the life of the project, the Commission assumes that the new home will be on the site for at least 50 years, if not more, as is typical for a residential home. The Commission expects, therefore, that the impacts of the proposed residential use of the site would be extended into the future for at least as long as the new house remains on the site.

Direct and Indirect ESHA Impacts

The impacts of the proposed residential use on ESHA are varied. First and foremost is the direct loss of dune ESHA onsite due to the proposed development footprint of 6,162 square feet (5,260 of which count toward the coverage limitation under the 1989 LUP), or approximately 23 percent of the 23,137-square-foot site.

The other significant onsite impacts to ESHA are due to the location of the residential use immediately in and adjacent to the remaining habitat, without any buffers. To implement Coastal Act Section 30240, the Commission requires not only avoidance of ESHA directly but also the use of buffering to minimize the disruption of adjacent habitat outside of the immediate footprint from non-compatible uses. Such impacts include light and noise; shading of dune habitat; the potential introduction on non-native plants and invasive species; direct disturbance of habitat from residentially-related activities; and potential impacts on flora and fauna from domestic animals. In the case of dune habitat, the presence of residential development also results in a general impact to the ecological functioning of the dune system, including fragmentation of habitat and the prevention of sand movement that is an ongoing feature of dune habitat systems.

As with other parcels in the Asilomar Dunes system, the indirect impacts to adjacent habitat are not avoidable if a residential use of the site were to be allowed because the entire site is ESHA. In other words, there is no feasible location that would also buffer the ESHA. Some of the impacts could perhaps be reduced, for example by making the home and driveway design more compact (smaller) in order to minimize coverage and maximize adjacent contiguous habitat. However, the overall impacts of the residential use on the dune system cannot be fully eliminated without entirely eliminating the residential use of the Applicants’ property which in certain circumstances might give rise to questions regarding takings.

Residential Use of Site

The proposed new residential use and development would displace areas of previously undeveloped dune habitat. The project includes 6,162-square-feet of residential development with three bedrooms, two-and-half bathrooms, media room, a two-car garage, and outdoor patio areas. The size of the new residence can be expected to support a large family, pets, cars, and other typical household indicators. These indicators may also correlate to a greater amount of light, noise, and other disturbances that can impact ESHA.

Temporary ESHA impacts

The project will also result in direct temporary impacts to dune ESHA necessitated by the construction process. Inevitably the project will entail impacts to dune and pine forest habitat beyond the proposed final development footprint, as it is not reasonably feasible to contain all of the construction activity within the development envelope itself. Although these areas could be required to be restored at the end of the construction process, these temporary impacts are, nonetheless, impacts to dune ESHA that must be accounted and mitigated for. The project will also include utility trenching and sewer installations that will also result in a temporary disruption of ESHA, and can reasonably be expected to result in future disruption for necessary repairs and maintenance.

Cumulative Impacts to Asilomar Dunes System

The Applicants' project is located near the northern end of the Asilomar Dunes dune-residential area of Pacific Grove, an area of approximately sixty acres where the dunes retain roughly their original contours. Although divided into about ninety-five lots and developed with approximately seventy-five existing dwellings, the area still contains some of the best remaining examples of the original Asilomar Dunes landform and flora.

The cumulative impacts of additional residential development, both new development and redevelopment, will have a substantial adverse impact on the unique ecology of the Asilomar Dunes, as each loss of natural habitat area within the Asilomar Dunes formation contributes to the overall degradation of this finite and extremely scarce coastal resource. This cumulative impact includes direct loss of habitat, increased fragmentation and interference with ecological processes, and intensified impacts from expanded and intensified residential development immediately within the dunes system.

Consistency with the Coastal Act and LUP Guidance

The residential zoning of the existing parcels in the Asilomar Dunes Residential Area pre-dates the Coastal Act, including Section 30240, the purpose of which is to protect environmentally sensitive habitat areas for only resource-dependent uses. The Coastal Act flatly prohibits residential uses in ESHA (because residential development is not a resource-dependent use), absent a need to comply with Section 30010 in order to avoid an unconstitutional taking of private property. Although landowners have no vested right in existing or anticipated zoning,⁶ in implementing the Coastal Act the Commission is sensitive to land use decisions and circumstances that predate enactment of the Act, as well as other relevant legal considerations, such as constitutional property rights. Notwithstanding constitutional takings concerns,

⁶ See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 796.

construction of a single-family dwelling within ESHA is completely incompatible with the requirements of Coastal Act Section 30240, which expressly states that “only uses dependent on [ESHA] resources shall be allowed within those areas.” Still, considering that the Asilomar neighborhood was subdivided and designated for residential use via the City’s land use and zoning designations prior to passage of the Coastal Act, and further considering that the Commission must allow *some* economically-beneficial use of such properties to avoid an unconstitutional taking of private property without compensation, the Commission originally certified the LUP in 1989 to allow for limited single-family, low-density residential dwellings pursuant to exacting criteria as reflected in the development standards for the Asilomar Dunes residential area within the LUP.

The Commission has a history of protecting the Asilomar Dunes system ESHA, including through development and application of guiding Pacific Grove LUP policies that attempt to strike a balance between maximum dune habitat protection and allowance of a reasonable residential use on pre-existing subdivided parcels in the Asilomar area based on investment-backed expectations. To minimize disturbance to the sensitive dune and related habitats, the total maximum aggregate lot coverage (not counting outdoor living space area) under the certified LUP is limited to fifteen percent of the lot area for most lots (i.e., for lots greater than one-half acre in size, such as is the case here). In cases where a lot is one-half acre or less, up to twenty percent aggregate lot coverage may be allowed by the LUP under certain circumstances. As defined in the LUP, this coverage calculation includes buildings, driveways, patios, and decks that do not allow for the passage of water and light to the dune surface, and any other features that eliminate native plant habitat. The LUP also allows an additional maximum of five percent of the lot area for “immediate outdoor living area” that is a dune area within which residential activities are allowed. Per the LUP, the remainder of any site (i.e., seventy-five to eighty percent, once maximum coverage and outdoor living area are accounted for) must be preserved as dune habitat, including through restoration/enhancement as necessary to ensure maximum feasible habitat value.

In this case, the proposed project is not within the 1989 LUP-defined maximums. The proposed residence and garage (3,093 square feet), cantilevered first-floor (458 square feet), courtyard area (220 square feet), concrete walkway (378 square feet), paved driveway (1,806 square feet (900 square feet of which do not count toward coverage under the 1989 LUP)), and area of sand in between the paved driveway that will not function as dune habitat (207 square feet) would cover 6,161 square feet or 27% of the site, while 5,260 square feet or 23% would *still* count towards coverage under the 1989 LUP. Thus, the house as designed would be 1,790 square feet over the 15% coverage allowed under the 1989 LUP, not counting the 900 square feet of driveway in the front setback (see LCP Policy 3.4.5.2).

The LUP states that an additional 5% of the site may be used for “immediate outdoor living space”, if left in a natural condition, or landscaped so as to avoid impervious surfaces and need not be included in the required conservation easement. The Applicants argue that the 220 square foot outdoor courtyard area in the middle of the residence (i.e., completely surrounded) and the remainder of the driveway not already excluded from the coverage requirement under the LUP (900 square feet), both made of permeable materials, should be considered outdoor living space.⁷

⁷ As discussed previously, a 12-foot-wide portion of the driveway within the 75-foot front yard setback may be

However, neither of these areas are going to be “left in a natural condition” nor “landscaped” as specified by the 1989 LUP. Rather, both of these areas will be covered with non-dune materials and related residential development. Although the LUP lacks set definitions regarding certain key terms described above as to what constitutes “immediate outdoor living space,” the Commission has historically understood this area as contiguous with the perimeter of the house (i.e. “immediate”), and most importantly that it must be left as sandy dune (i.e., “left in a natural condition”) or must only contain native dune plant materials (i.e., landscaped). The Commission’s understanding is that outdoor living space is essentially designed to provide a dune backyard where residential areas can occur (i.e., “need not be included in the conservation easement”). The Applicants’ proposed driveway and courtyard do not constitute immediate outdoor living space because they would *not* be left in a natural condition and would *not* be landscaped, but instead covered with residential development (granted, permeable residential development, but residential development nonetheless). Moreover, the internal courtyard is completely enclosed by the proposed structure within the interior of the house and would not be contiguous with other dune space. The courtyard would thus function more as an interior residential room, albeit without a roof, rather than an immediate outdoor area, and any dune values there severed from the surrounding dune areas. In other words, it provides no appreciable broader habitat value (as being contiguous with the remaining undisturbed habitat onsite) while simultaneously allowing for some transitional residential use (as reflected in the LUP policy requirement that immediate outdoor living area be left in a natural condition or landscaped), but rather simply serves a residential use, with the outdoor component of the courtyard serving primarily as an architectural or aesthetic function, with minimal, if any, biological value.

The Applicants also argue that the cantilevered first-floor and strip of sand in the middle of the driveway should not count toward dune ESHA coverage at all. However, the LUP states that all structures, driveways, decks, etc. will be counted toward coverage, as well as “*any other features* that eliminate potential native plant habitat” (see LCP Policy 3.4.5.2). Although the 1989 LUP does not clearly define what “features” should count towards the coverage calculation, the Applicants’ proposal provides a clear example of the type of development that is specifically designed to circumvent the coverage limitation and attempt to maximize residential development in dune ESHA in a manner not compatible with and not contemplated by the LUP policies. The Applicants’ 458 square feet of cantilevered first-floor will hover anywhere from 1 inch to 2 feet above the dunes. This area would be deprived of adequate space, light, and rainfall, which will not provide the type of conditions for this sensitive habitat necessary to support it, including the endangered dune plants and seed stock that exist in the Asilomar Dunes. Although the cantilevered first-floor will not directly displace the dune habitat that it cantilevers over, for all intents and purposes, the cantilevered first-floor will eliminate this area as functioning dune habitat and thus should count towards coverage. The strip of sand in the middle of the driveway will constantly have cars passing over it, literally cutting down the opportunity for dune species to grow in this space. At a minimum, this area could perhaps be counted as immediate outdoor living space, but this area is best categorized as coverage because immediate outdoor living

excluded from the coverage calculation under the LUP if the entire driveway is comprised of pervious or semi-pervious materials. This is the basis for excluding 900 square feet of the 1,806 square foot driveway from the coverage calculation under the LUP. Thus, the remaining portion of the driveway which the Applicants argue should qualify as “immediate outdoor living area” amounts to 906 square feet.

space should be understood to provide living/yard space, as explained above, and this strip of sand merely constitutes an architectural/aesthetic component of the driveway.

The Commission has in the past applied the guiding LUP 15/5 percent (or 20/5 percent for lots less than half-an-acre in size) coverage rule cited earlier for cases in Asilomar where new development is proposed on vacant lots. This is an attempt to address the Coastal Act requirements to protect ESHA from non-resource-dependent development, while avoiding an unconstitutional taking of private property without compensation. In this case, the proposed project would cover approximately 23% of the site as calculated by the LUP (and actually 27% of the site overall), which is significantly more than the maximum 15% coverage allowed under the 1989 LUP, not counting the 900 square feet of driveway in the front setback. Thus the project is not consistent with the LUP guidance, and the Commission finds that the amount of ESHA impacts associated with the proposed project cannot be found Coastal Act consistent in a taking context, including based on the Commission's long and consistent history related to same in these dunes.

One option available to the Commission in light of these inconsistencies is to condition the project to make it consistent on these points. However, the proposed project here is substantially inconsistent on these points (and inconsistent with the guiding LUP policies), and would require a complete redesign to make it consistent in relation to dune ESHA. As explained above, the "courtyard" area is located at the center of the house and would need to be relocated to the exterior of the house to count as outdoor living space, which would also require a total redesign of the house itself. Such a redesigned project should be submitted again to provide the Commission an opportunity to review for consistency. Additionally, the City of Pacific Grove should also be given an opportunity to review a new project for consistency with its local municipal code and architectural review standards. Thus, in this case, denial of the project is warranted to allow the applicant an opportunity to redesign the project that is responsive to the concerns raised in this report.

Finally and on a related note, and as discussed below, the City's proposed LCP is before the Commission at the same July meeting in San Luis Obispo for action. Assuming that the LCP is certified prior to resubmittal of a new application by the Applicants to address the aforementioned coastal resource inconsistencies with respect to ESHA, the newly certified Pacific Grove LCP, which may have updated/refined development standards with respect to residential development within Asilomar Dunes, would be the standard of review. Otherwise, the standard of review will again be Chapter 3 of the Coastal Act with the 1989 LUP providing non-binding guidance.

D. VISUAL RESOURCES

Applicable Policies

Section 30251 of the Coastal Act states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration

of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The City's certified Land Use Plan, which is non-binding guidance in this case, also contains the following relevant policies:

LUP Policy 2.5.2. ... *Coastal area scenic and visual qualities are to be protected as resources of public importance. Development is required to be sited to protect views, to minimize natural landform alteration, and to be visually compatible with the character of surrounding areas.*

LUP Policy 2.5.5.4. *New development on parcels fronting Sunset Drive shall complement the open space character of the area. Design review of all new development shall be required. The following standards shall apply; ... Residential structures shall be single story in height and shall maintain a low profile complimenting the dune topography. In no case shall the maximum height exceed 18 ft. above natural grade within the foundation perimeter prior to grading.*

LUP Policy 2.5.5.5. *Landscape approval shall be required for any project affecting landforms and landscaping. A landscaping plan, which indicates locations and types of proposed plantings, shall be approved by the Architectural Review Board.*

LUP Policy 2.5.5.6. ... *Utilities serving new single-family construction in scenic areas shall be placed underground.*

LUP Policy 3.1.1.2. *New buildings shall be limited to two stories (25 ft.) in height unless otherwise specified by the Plan...*

LUP Policy 3.4.4.1. *All new development in the Asilomar Dunes area shall be controlled as necessary to ensure protection of coastal scenic values and maximum possible preservation of sand dunes and the habitat of rare and endangered plants.*

Consistency Analysis

Both the Coastal Act and the 1989 LUP require that new development be compatible with and subordinate to the character of this important Asilomar Dunes viewshed. This viewshed is to be protected as a "resource of public importance." The 1989 LUP provides guidance in this respect, including by limiting overall height to eighteen feet and one story for residences along Sunset Drive, twenty-five feet elsewhere, and by requiring that development maintain a low-profile that complements the dune topography. The subject lot is located along Sunset Drive and thus is limited to eighteen feet in height and one story by the LUP. In this case the front of the house would be twelve feet tall, with a rooftop deck area atop the living room that measures seventeen feet eleven inches from natural grade to the top of the glass guardrail that surrounds the deck, while the back of the house measures seventeen feet two inches above natural grade. Thus the

project is within the 1989 LUP height requirement of eighteen feet above natural grade for projects along Sunset Drive.

However, the 1989 LUP also states that “[r]esidential structures *shall be single story* in height.” Here, the Applicants propose a 430-square-foot master bedroom area that will be located *above* the main living area and accessible only by a staircase. Although the master bedroom area would be within the overall height limit, this portion of the structure is clearly two stories, which is prohibited by the 1989 LUP. Although the LUP is silent with regard to rooftop decks, this area could also be considered a prohibited second story as residential activities would take place above the first floor. Additionally, as explained above, the proposed residence is above the allowed coverage percentage of the site. Thus the mass and scale of the proposed project is larger than what the 1989 LUP contemplates, which further exacerbates impacts on visual resources.

In short, the proposed project is in a visually sensitive area and would impact significant public views, does not appropriately blend into the Asilomar aesthetic as required by the 1989 LUP, and is inconsistent with the visual protection provisions of Section 30251 of the Coastal Act. A substantial redesign of the project is necessary to address these issues and thus, as explained above, denial of the project is warranted to allow the Commission and the City of Pacific Grove the opportunity to review a redesigned project.

E. PUBLIC SERVICES

Applicable Policies

With regard to adequate public services, Section 30250(a) of the Coastal Act states:

New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.

The LUP also has policies specific to the availability and allocation of water to serve new development, including:

***LUP Policy 4.1.4.1.** When the allocation for a particular planning area is exhausted, no additional development which would increase water use shall be approved in that planning area. Exceptions will be allowed for coastal priority uses when, by transferring water allocations from other coastal zone planning areas, sufficient water can be found to support such development.*

Consistency Analysis

A guiding principle of the Coastal Act and the City’s 1989 LUP is to permit new development *only* when adequate public services are available, and specifically only when a project’s water demand is consistent with available supply. The City receives water services from the California American Water (Cal-Am) Company. Cal-Am provides the vast majority of its water to its users through groundwater extractions and diversions from the Carmel River, and adverse impacts on

the Carmel River from Cal-Am water withdrawals have been well documented.⁸ The River, which lies within the approximate 250-square-mile Carmel River watershed, flows 35 miles northwest from the Ventana wilderness in Big Sur to the Pacific Ocean. Surface diversions and withdrawals from the River's alluvial aquifer have had significant impacts on riparian habitat and associated species, particularly in the River's lower reaches.⁹ This includes adverse impacts to two federally threatened species, California red legged frog (*Rana draytonii*), listed as federally-threatened in 1996, and steelhead (*Oncorhynchus mykiss*), listed as federally-endangered in 1997. In particular, water diversions and withdrawals reduce the stream flows that support steelhead habitat and the production of juvenile fish, especially during dry seasons.

Due to illegal withdrawals from the Carmel River Basin that have adversely impacted the River's habitat, Cal-Am is limited in its ability to provide new water meter connections by a 2009 Cease and Desist Order (CDO) issued by the State Water Resources Control Board (SWRCB). Because the project site is currently vacant and without a water meter, adequate water is not currently available to serve the project and Cal-Am will be unable to provide a new water connection unless and until the alternative water sources that do not adversely impact the Carmel River Basin are secured and the SWRCB lifts the CDO on new water connections.

LUP Policy 4.1.4.1. states that when water supplies are exhausted, as is the case here, "***no additional development which would increase water use shall be approved.***" This policy reflects Coastal Act Section 30250(a), which states that development shall not be located in areas where access to public services will have significant adverse effects to coastal resources. As explained above, substantial evidence demonstrates that even existing withdrawals from the Carmel River have significant adverse effects to the Carmel River and associated coastal resources. Because the proposed project would be a new house on a vacant lot that is not currently served with water, any water service to the proposed project would lead to an increase of water use and thus an increase to the adverse effects of Cal-Am water withdrawals. Thus, and also in light of the other Coastal Act inconsistencies heretofore identified, the 1989 LUP and the Coastal Act compel denial of the proposed project.

Therefore, to carry out the Coastal Act and 1989 LUP standards above, denial of the proposed project is warranted for these Coastal Act public service inconsistencies as well.

F. LOCAL COASTAL PROGRAM

Section 30604(a) of the Coastal Act states:

Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with Chapter 3 (commencing with Section 30200) and that the permitted development will not prejudice the ability of the local government to

⁸ See, for example, the 2005 Watershed Assessment and Action Plan for the Carmel River, Carmel River Watershed Conservancy; and the Carmel River Watershed Assessment and Action Plan 2016 (update to the 2005 Plan).

⁹ See, for example, Instream Flow Needs for Steelhead in the Carmel River: Bypass flow recommendations for water supply projects using Carmel River Waters, National Marine Fisheries Service, June 3, 2002.

prepare a local coastal program that is in conformity with Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for that conclusion.

As discussed in above, the City of Pacific Grove has submitted an LUP update and brand new IP proposal to the Commission for consideration to fully certify the City's LCP for the first time, and that proposed LCP is before the Commission at the Commission's July meeting in San Luis Obispo. That proposed LCP includes a variety of updated and refined policies and provisions that are relevant to the coastal resource issues raised by this CDP application, particularly with respect to protection of ESHA resources, public views, and the adequacy of public services such as water. More specifically, some of the very issues raised in this CDP action are those that will be discussed and decided by the Commission at the same meeting as the action on this CDP application is scheduled; including the appropriate level of residential coverage within the Asilomar Dunes residential area for Coastal Act consistency generally, ambiguities regarding what constitutes coverage and outdoor living space, appropriate structural heights, exemptions to coverage calculations for residential driveways, height and stories in the dunes, and adequacy of water supplies.

As explained above, all of the Asilomar Dunes policies are an attempt to be as consistent as possible with the Coastal Act's ESHA protection policies, while providing the *minimum* residential development necessary to avoid an unconstitutional taking of private property. In sum the objective is not to maximize residential development in dune ESHA, rather the objective is to allow for a limited amount of development to avoid an unconstitutional taking of private property, and to protect the dune as much as possible in doing so. And the proposed LCP that is currently before the Commission will modify and refine all of these standards, including based on experience gained over 40 years of coastal permitting in these very dunes. Taking an action on this CDP at this juncture, including based on the existing LUP as guidance, may prejudice consideration of the LCP, which warrants CDP denial under Coastal Act Section 30604(a). Thus, denial of the CDP for the proposed development is warranted for these reasons as well.¹⁰

¹⁰ And the only reason that this CDP has been scheduled for Commission consideration at the July hearing is because the Applicants have asserted that the project is required to be deemed approved by the provisions of the Permit Streamlining Act (PSA). Specifically, the application was filed as complete on November 21, 2018, and the deadline for Commission action under the PSA based on that filing date was May 20, 2019 (i.e., 180 days from filing). Pursuant to PSA requirements, the Applicants gave the Commission and interested parties notice on June 5, 2019 that it was pursuing the 'deemed approved' protocol afforded the Applicants under the PSA. Based on those PSA provisions, the Commission has 60 days from the day it received the notice to take an action on the application or it will be deemed approved under the PSA (i.e., by August 5, 2019).

Commission staff notes that the reason that this application had not been brought to the Commission by the 180-day action deadline is because the project raises a series of issues related to development in the Asilomar Dunes area specifically, and the adequacy of services (in this case water supply) more generally, when those issues are also important within the City of Pacific Grove's proposed LCP pending in front of the Commission. Commission staff believed it imprudent to bring this application forward when that LCP was about to be heard by the Commission (and indeed it is scheduled for action at the same Coastal Commission July meeting in San Luis Obispo as is this application), including to avoid any prejudice of that LCP planning action based on the facts of any particular

G. TAKINGS

In addition to evaluating the proposed development for consistency with the Coastal Act, considering that staff is recommending denial of the proposed project, the Commission must also evaluate the effect of a denial action with respect to takings jurisprudence. In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional taking, the Coastal Act provides a provision that allows a narrow exception to strict compliance with the Act's regulations based on constitutional takings considerations. Coastal Act Section 30010 provides:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Although the judiciary would be the final arbiter on constitutional takings issues, the Coastal Act, as well as the State and Federal Constitutions, enable the Commission to assess whether its action might constitute a taking so that the Commission may take steps to avoid doing so. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the confidence that its actions are consistent with Section 30010 and constitutional takings jurisprudence. If the Commission determines that its action could constitute a taking, then the Commission could conversely find that application of Section 30010 would require it to approve some amount of development in order to avoid an uncompensated taking of private property. In this latter situation, the Commission could propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some reasonable amount of development.

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

General Principles of Takings Law

individual case and/or the entreaties of any particular individual applicant, as is required by the Coastal Act. The Applicants refused to allow for the 90-day PSA extension to allow for the LCP to be approved with updated, more consistent residential standards applicable to the Asilomar Dunes residential area prior to consideration of this CDP application. Thereafter, the Applicants notified the Commission that the project would be required to be 'deemed approved' per the PSA, subject to the 60-day extension for the Commission to take action, and staff set the matter for hearing accordingly (i.e., the application before the Commission today).

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.”¹¹ Similarly, Article 1, Section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.” Despite the slightly different wordings, the two “takings clauses” are construed congruently in California, and California courts have analyzed takings claims under decisions of both state and federal courts (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664.). The “damaging private property” clause in the California Constitution is not relevant to the current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The United States Supreme Court has held that the takings 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 (see *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).

¹¹ 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).

(*emphasis in original*); *Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 (regulatory takings occur only under “extreme circumstances.”¹²).

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

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property (*MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Likewise, a “final and authoritative determination” does not occur unless the applicant has first submitted a development plan which was rejected and also sought a variance from regulatory requirements which was denied (see *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).

Takings Claim Here Would be Premature

Here, although the current project proposal must be denied for its above-referenced Coastal Act inconsistencies, 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 Applicants to consider if they seek to resubmit another project proposal that is fully consistent with applicable Coastal Act standards (or anticipated LCP standards, if the City’s submitted LCP is certified prior to a CDP decision on the Applicants’ resubmittal of an application for revised development). Until the Applicants submit a reduced, scaled-down development proposal with adequate public services that addresses the Coastal Act inconsistencies identified in this report, 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 existing Coastal Act (or potentially future LCP) requirements. In other words, the Commission’s denial here is not to suggest that no residential

¹² 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).

proposal is allowed or could be approved on the project site, but rather that this particular project proposal is not allowable on the project site at this time under the Coastal Act.

In sum, the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with the Coastal Act's ESHA, visual resource, and public services policies, would not result in an unconstitutional taking at this time. The Applicants may return to the City to apply for a similar but scaled-down project with adequate public services on the current parcel under consideration, which could adhere to Coastal Act requirements (or anticipated LCP requirements), thereby affording an economic use of the property. Any takings claim is therefore premature at this time.

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 (CCR) state in applicable part:

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

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

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

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS¹³

- *Botanical Survey Report Jeremy and Tiffany Cieslak Residence*, Thomas K. Moss. February 4, 2017.
- *Habitat Restoration Plan Jeremy and Tiffany Cieslak Residence*, Thomas K. Moss. February 8, 2017.
- *Archeological Records Search, Site Reconnaissance, and Subsurface Testing APN 007-041-020, Pacific Grove, Monterey County, California*. John Schlagheck, October 2017.
- *1635 Sunset Drive Initial Study and Mitigated Negative Declaration*. City of Pacific Grove. February 2018.
- *Architectural Permit and Tree Permit 17-132 for a property located at 1635 Sunset Drive*. City of Pacific Grove Community Development Department – Planning Division. October 8, 2018.

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- City of Pacific Grove Planning Staff
- Ohlone Costanoan-Esselen Nation (Chairperson Louise J. Miranda Ramirez)/

¹³ These documents are available for review in the Commission’s Central Coast District office in Santa Cruz.