

**CALIFORNIA COASTAL COMMISSION**

SOUTH CENTRAL COAST DISTRICT  
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# W17a

**DATE:** June 27, 2019

**TO:** Commissioners and Interested Persons

**FROM:** Steve Hudson, Deputy Director  
Barbara Carey, District Manager  
Deanna Christensen, District Supervisor  
Megan Sinkula, Coastal Program Analyst

**SUBJECT:** County of Santa Barbara Local Coastal Program Amendment No. LCP-4-STB-18-0039-1-Part D (O'Neil Property Rezone) for Public Hearing and Commission Action at the July 10, 2019 Commission Meeting in San Luis Obispo.

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## DESCRIPTION OF THE SUBMITTAL

The County of Santa Barbara (County) is requesting a project-driven amendment to the Land Use Plan (LUP) and Implementation Plan (IP/CZO) portions of its certified Local Coastal Program (LCP) that would affect only one parcel within the County (Exhibits 3-4). The proposed LUP amendment would change the land use designation of a property located at 2551 Wallace Avenue (APN 005-250-001) in the Summerland community of Santa Barbara County from Recreation/Open Space to Single-Family Residential, and the associated IP/CZO amendment would change the zoning designation of the subject property from Recreation (REC) to Single-Family Residential (7-R-1; 7,000 sq. ft./0.16-acre minimum lot size). Specifically, the amendment proposes to change the land use and zoning designation of the subject parcel from recreation to residential on the Summerland Community Plan Land Use and Zoning Maps (certified as part of the County's LUP) and within Section 35-54 of the County's IP/CZO.

The County submitted LCP Amendment No. LCP-4-STB-18-0039-1-Part D to the Commission on May 21, 2018. The amendment submittal was deemed complete on June 5, 2018 and the 90-day time limit for Commission action on the amendment was September 3, 2018. However, at the August 10, 2018 hearing, the Commission granted a one-year time extension to act on the subject amendment pursuant to Coastal Act § 30517 and California Code of Regulations, Title 14, § 13535(c), and the one-year time extension will end on September 3, 2019.

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## SUMMARY OF STAFF RECOMMENDATION

The major issues raised by this amendment request are the conversion of a parcel from a higher priority land use to a lower priority land use, the ability of public services to accommodate future residential development of the parcel, the lack of demonstrated legal access to the parcel, the potential for risks to life and property from geologic and shoreline hazards, and the potential for adverse impacts on scenic resources should the parcel be residentially redeveloped.

Commission staff recommends that the Commission, after public hearing, **deny** the County of Santa Barbara's proposed LCP Amendment No. LCP-4-STB-18-0039-1-Part D. The motion and resolution to accomplish this recommendation are found on page 6 of this staff report. The standard of review for the change to the LUP is whether the LUP, as amended, would still meet the requirements of and be

consistent with the policies of Chapter 3 of the Coastal Act. The standard of review for the proposed change to the IP/CZO is whether the IP/CZO, as amended, would still conform with and be adequate to carry out the provisions of the LUP portion of the certified County of Santa Barbara LCP, as amended.

The subject parcel that is proposed to be rezoned from Recreation/Open Space to Residential is a 0.10-acre (4,356 sq. ft.) coastal bluff-top property in the Summerland community of Santa Barbara County. It is located between the Pacific Ocean and railroad tracks and is entirely surrounded by vacant parcels owned by the Southern Pacific Railroad Company (also known as the Union Pacific Railroad Company) (Exhibit 3), with the exception of one parcel immediately to the north of the subject parcel that is developed with railroad tracks. Since 1973, the subject parcel has been assigned a land use designation of Recreation/Open Space within the County's Comprehensive Plan. This land use designation for the parcel has since been certified within the County's LUP (1980) and the Summerland Community Plan (1992), and in 1984, the parcel's zoning designation of Recreation was certified within the County's IP/CZO.

In 2005, the applicant applied for a permit to demolish an existing residence onsite and construct a new residence, and the County denied the permit request based upon the existing recreation zoning designation that does not allow for residential redevelopment of the site. The County and the applicant did not pursue an LCP amendment to change the recreation land use designation or zone of the parcel in 2005. Notwithstanding the County's denial of a coastal development permit for the project, the owner of the subject parcel demolished the legal non-conforming one-story residence onsite (Exhibit 5) the following year and began construction of a new two-story residence without the benefit of any permits (Exhibit 6). Consequently, the owner of the subject parcel knowingly and intentionally abandoned his right to maintain the legal non-conforming residential structure on the property.

The proposed LCP amendment was approved by the County in March 2018 concurrently with an associated Coastal Development Permit and a Variance to allow for the after-the-fact approval of the demolition of a 1,066 sq. ft. one-story residence (Exhibit 5), the demolition of the existing, unpermitted, and partially constructed 1,433 sq. ft. two-story residence (Exhibit 6), and the construction of a new, 2,218 sq. ft. two-story residence on the subject parcel. The approved permit for the project was conditioned to require an agreement between the applicant and the Southern Pacific Railroad Company (Railroad Company) to create an easement for a connection to the public sewer system, as well as to require an LCP amendment (certified by the Coastal Commission) for the land use and zoning designation change of the property prior to permit effectiveness. The approved variance allows a north yard setback of 2 ft., 4 in. instead of the required 10 ft. setback, an east yard setback of 8 ft. instead of the required 10 ft., and zero uncovered parking spaces instead of the required two uncovered parking spaces to serve the development.

Conversion of the parcel from recreation to residential land use and zoning designations would be inconsistent with the priority of land uses established by the Chapter 3 policies of the Coastal Act and the policy directives of the County's LUP to utilize the site for public recreational and/or open space use once the legal, non-conforming residential use of the property is abandoned or otherwise terminated. In addition, the evidence within the County's administrative record demonstrates that the subject property site is not suitable for private residential development, for the following reasons. First, due to the fact that the subject property is surrounded by parcels owned by the Railroad Company (Exhibit 3), there is a question as to whether the property owner has the legal ability to access the subject parcel. For the same reason, the applicant has not demonstrated that he possesses the property rights necessary to allow for a connection to the public sewer system to serve a residential development of the site. The subject parcel is also sited on a coastal bluff top that is subject to erosion

from wave action, which will be exacerbated by sea level rise, and the site contains pockets of unstable fill material. Long-term residential use of the blufftop property therefore would present risks to life and property. Finally, the parcel is entirely within a designated view corridor (Exhibit 7) because it is highly visible from public vantage points throughout Summerland (Exhibit 8), and a change of zoning to allow a residential development of the site could adversely impact blue water views from public viewing areas.

Therefore, staff recommends that the Commission deny the LCP amendment request to rezone the subject parcel from Recreation to Residential because the proposed LUP amendment does not conform to the Chapter Three policies of the Coastal Act, and the proposed IP/CZO amendment does not conform with, nor is it adequate to carry out, the provisions of the certified LUP.

<p><b>Additional Information:</b> Please contact Megan Sinkula at the South Central Coast District Office of the Coastal Commission at (805) 585-1800 or 89 South California Street, Suite 200, Ventura, CA 93001</p>
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<b>Exhibit 1.</b>	Vicinity Map
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<b>Exhibit 3.</b>	Parcel Map
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## **I. PROCEDURAL OVERVIEW**

### **A. STANDARD OF REVIEW**

The Coastal Act provides:

*The Commission shall certify a land use plan, or any amendments thereto, if it finds that a land use plan meets the requirements of, and is in conformity with, the policies of Chapter 3 (commencing with Section 30200)...(Section 30512(c))*

The Coastal Act further provides:

*The Commission may only reject zoning ordinances, zoning district maps, or other implementing actions on the grounds that they do not conform with, or are inadequate to carry out, the provisions of the certified land use plan. If the Commission rejects the zoning ordinances, zoning district maps, or other implementing actions, it shall give written notice of the rejection, specifying the provisions of the land use plan with which the rejected zoning ordinances do not conform, or which it finds will not be adequately carried out, together with its reasons for the action taken. (Section 30513)*

The proposed amendment affects the LUP and IP/CZO components of the certified County of Santa Barbara LCP. The standard of review that the Commission uses in reviewing the proposed LUP amendment is whether the LUP, as proposed to be amended, would remain consistent with the policies of Chapter 3 of the Coastal Act. The standard of review for the proposed amendment to the IP/CZO of the certified LCP, pursuant to Section 30513 of the Coastal Act, is whether the IP/CZO, as proposed to be amended, would remain in conformance with, and adequate to carry out, the provisions of the certified LUP. All Chapter 3 policies of the Coastal Act have been incorporated in their entirety into the certified LUP as guiding policies.

### **B. PUBLIC PARTICIPATION**

Section 30503 of the Coastal Act requires public input in the preparation, approval, certification and amendment of any LCP. The County held public hearings on August 12, 2015, November 3, 2015, February 27, 2018, and March 9, 2018. The hearings were noticed to the public consistent with Section 13515 of Title 14 of the California Code of Regulations. The County received written and oral comments regarding the proposed amendment from members of the public. After the County submitted its proposed LCP amendment to the Commission, the Commission held a public hearing on July 10, 2019. Notice of the subject amendment was posted in a local newspaper at least ten days prior to the July 2019 Coastal Commission hearing, and individual notices have been distributed to all known interested parties.

### **C. PROCEDURAL REQUIREMENTS**

Pursuant to Section 13551(b) of the California Code of Regulations, the County resolution for submittal of the LCP amendment can either require formal local government adoption after Commission approval, or is an amendment that will take effect automatically upon Commission approval pursuant to Public Resources Code Sections 30512, 30513, and 30519. The County of Santa Barbara Board of Supervisors submittal resolution specifies that this amendment shall take effect upon

the date it is certified by the Commission. If the Commission denies the LCP Amendment, as submitted, no further action is required by either the Commission or the County. If the Commission approves this amendment subject to suggested modifications by the Commission, the County must act to accept the certified suggested modifications within six months from the date of Commission action in order for the amendment to become effective (CCR Sections 13544.5 and 13537). Pursuant to Section 13544 of the California Code of Regulations, the Executive Director shall determine whether the County's action is adequate to satisfy all requirements of the Commission's certification order and report on such adequacy to the Commission.

## **II. STAFF RECOMMENDATION, MOTIONS, & RESOLUTIONS**

Following public hearing, staff recommends the Commission adopt the following resolution and findings. The appropriate motion to introduce the resolution and a staff recommendation is provided prior to each resolution.

### **A. DENIAL OF THE LAND USE PLAN (LUP) AMENDMENT AS SUBMITTED**

#### **MOTION:**

*I move that the Commission **certify** Amendment No. LCP-4-STB-18-0039-1-Part D to the County of Santa Barbara Land Use Plan, as submitted by the County of Santa Barbara.*

#### **STAFF RECOMMENDATION TO DENY:**

Staff recommends a **NO** vote. Failure of this motion will result in denial of the Amendment as submitted and adoption of the following resolution and findings. The motion passes only by an affirmative vote of a majority of the Commissioners present.

#### **RESOLUTION TO DENY CERTIFICATION OF THE LAND USE PLAN AMENDMENT AS SUBMITTED:**

The Commission hereby **denies** certification of Amendment No. LCP-4-STB-18-0039-1-Part D to the County of Santa Barbara Land Use Plan as submitted by the County of Santa Barbara and adopts the findings set forth below on the grounds that the land use plan amendment does not conform with the policies of Chapter 3 of the Coastal Act. Certification of the Land Use Plan Amendment would not comply with the California Environmental Quality Act because there are feasible alternatives or mitigation measures which could substantially lessen any significant adverse impact which the Land Use Plan Amendment may have on the environment.

### **B. DENIAL OF THE IMPLEMENTATION PLAN/COASTAL ZONING ORDINANCE (IP/CZO) AMENDMENT AS SUBMITTED**

#### **MOTION:**

*I move that the Commission **reject** Amendment No. LCP-4-STB-18-0039-1-Part D to the County of Santa Barbara Implementation Plan/Coastal Zoning Ordinance, as submitted by the County of Santa Barbara.*

**STAFF RECOMMENDATION TO DENY:**

Staff recommends a **YES** vote. Passage of this motion will result in rejection of the amendment and the adoption of the following resolution and findings. The motion passes only by an affirmative vote of a majority of the Commissioners present.

**RESOLUTION TO DENY CERTIFICATION OF THE IMPLEMENTATION PLAN/COASTAL ZONING ORDINANCE AMENDMENT AS SUBMITTED:**

The Commission hereby **denies** certification of Amendment No. LCP-4-STB-18-0039-1-Part D to the County of Santa Barbara Implementation Plan/Coastal Zoning Ordinance as submitted by the County of Santa Barbara and adopts the findings set forth below on the grounds that the Implementation Plan/Coastal Zoning Ordinance amendment does not conform with, and is inadequate to carry out, the provisions of the certified Land Use Plan. Certification of the Implementation Plan/Coastal Zoning Ordinance Amendment would not comply with the California Environmental Quality Act because there are feasible alternatives or mitigation measures which could substantially lessen any significant adverse impact which the Implementation Plan/Coastal Zoning Ordinance Amendment may have on the environment.

**III. FINDINGS FOR DENIAL OF THE LUP & IP/CZO AMENDMENT**

The following findings support the Commission's denial of the County of Santa Barbara's LCP Amendment request. The Commission hereby finds and declares as follows:

**A. AMENDMENT DESCRIPTION AND BACKGROUND**

The County is requesting a project-driven amendment to the LUP and IP/CZO portions of its certified LCP that would affect only one parcel within the County (Exhibits 3-4). The proposed LUP amendment would change the land use designation of a property located at 2551 Wallace Avenue (APN 005-250-001) in the Summerland community of Santa Barbara County from Recreation/Open Space to Single-Family Residential, and the associated IP/CZO amendment would change the zoning designation of the subject property from Recreation (REC) to Single-Family Residential (7-R-1; 7,000 sq. ft./0.16-acre minimum lot size). Specifically, the amendment proposes to change the land use and zoning designation of the subject parcel from recreation to residential on the Summerland Community Plan Land Use and Zoning Maps (certified as part of the County's LUP) and within Section 35-54 of the County's IP/CZO.

The subject parcel is sited on a 0.10-acre (4,356 sq. ft.) coastal bluff-top property between the Pacific Ocean and the Southern Pacific Railroad Company (also known as the Union Pacific Railroad Company) tracks (Exhibits 1-4). Currently, the parcel has a land use designation of Recreation/Open Space and a zoning designation of Recreation. The closest existing residential development is 0.68 miles away to the east and 0.26 miles away to the west. Existing nearby public recreation areas include the public beach immediately seaward of the subject parcel, two public beach vertical accessways (one that is 0.53 miles to the east and one that is 0.11 miles to the west) on either side of the subject parcel, and Lookout Park, a 3.4-acre bluff-top park that overlooks the ocean and is sited 0.45 miles from the subject parcel. Notably, the Coastal Commission recently approved a project-driven LCP Amendment (No. LCP-4-STB-18-0071-2-Part A) submitted by the County that will implement public coastal

access enhancements in this immediate area (as part of a transportation improvement project along the U.S. Highway 101 corridor between the City of Carpinteria and the City of Santa Barbara) that include benches and tables along the bluff-top on Finney Road, a new group picnic area with a barbecue facility, covered and uncovered seating areas, a walking path, and a public restroom at Lookout Park, and an increase of available public coastal access parking along Wallace Avenue.

On March 9, 2018, the proposed LCP amendment was approved by the County concurrently with an associated Coastal Development Permit and a Variance to allow for the after-the-fact approval of the demolition of a 1,066 sq. ft. one-story residence (Exhibit 5), the demolition of the existing, unpermitted, and partially constructed 1,433 sq. ft. two-story residence (Exhibit 6), and the construction of a new, 2,218 sq. ft. two-story residence on the subject parcel. The approved permit for the project was conditioned to require an agreement between the applicant and the Southern Pacific Railroad Company (Railroad Company) to create an easement for a connection to the public sewer system, as well as to require an LCP amendment (certified by the Coastal Commission) for the land use and zoning designation change of the property from Recreation/Open Space to Residential. If such an agreement cannot be reached with the Railroad Company, the approved permit specifies that the applicant must remove all components of the development that are sited on the surrounding railroad-owned parcels. Further, the approved permit conditions state that the permit shall not become effective until an easement is created or the project components on the surrounding railroad-owned properties are removed, and the associated LCP amendment is certified by the Coastal Commission. The approved variance allows a north yard setback of 2 ft., 4 in. instead of the required 10 ft. setback, an east yard setback of 8 ft. instead of the required 10 ft., and zero uncovered parking spaces instead of the required two uncovered parking spaces to serve the development.

### Background

A single-story residence was constructed on the subject parcel in approximately the 1890's (Exhibit 5), and in 1901, the adjacent property immediately landward of the subject property was quitclaimed by the County to the Railroad Company. Between 1953 and 1958, the subject property was zoned as a "Beach Development District", which allows for residential use of the site, and in 1973, the subject property was assigned a land use designation of Recreation pursuant to the adoption of the County's Comprehensive Plan. In 1980, the County's LUP was certified, and the Recreation land use designation of the subject site was carried over from the Comprehensive Plan. In 1984, the property was rezoned from Beach Development District to Recreation pursuant to the certification of the County's IP/CZO. The County's administrative record for the LCP amendment request contains internal notations made on zone change maps that demonstrate that the rezoning of this parcel from Beach Development District to Recreation during certification of the IP/CZO was intentional. Further, in 1992, the Summerland Community Plan was certified by the Commission as a component of the County's certified Land Use Plan and the Recreation land use designation was once again carried over and certified for the site. The Recreation/Open Space land use and zoning designation does not allow for a residential use of the site. As such, the single-story residence that had previously existed on the site since approximately the 1890's was considered a legal, non-conforming residence, and the residential use of the site was a legal, non-conforming use.

In 1996, the current property owner, Jeffrey O'Neil ("O'Neil"), purchased the property. Jeffrey O'Neil is an organizing member of the Summerland Board of Architectural Review, which functions as a local advisory board and design review committee that provides advisory recommendations to the County's (South) Board of Architectural Review. In 2005, O'Neil applied for a Coastal Development Permit from the County for the demolition of the one-story residence onsite and construction of a new two-



story residence, and the County denied the permit request. The County and the applicant did not pursue a zone change in 2005. The County's denial was based upon the finding that the proposed development was inconsistent with the applicable land use regulations. The original residence was considered non-conforming due to the fact that it was constructed prior to the implementation of zoning requirements and because it was located on property zoned Recreation, which is a zoning designation that does not allow residential development. Therefore, the County denied the permit request because the zoning designation of the property does not allow for a residential development of the site.

On March 20, 2007, the County issued a Stop Work Notice to O'Neil for the construction of what appeared to be a second-story addition to the existing single-family dwelling onsite without permits. During issuance of the Stop Work Notice, O'Neil refused to cease construction of the unpermitted development, and County officials requested the presence of law enforcement to enforce the Notice. On March 21, 2007, County officials observed ongoing construction at the site in violation of the Stop Work Notice. On March 22, 2007, County officials attempted to perform a site visit to determine the status of the violation of the Stop Work Notice, and O'Neil denied access to the site. On the same day, County officials issued a Stop Work Order for the site. On April 18, 2007, County officials obtained an inspection warrant for the site, and the next day County officials met with O'Neil to deliver the warrant and schedule an inspection of the site.

County officials performed an inspection of the site on April 26, 2007 and evaluated the scope of the unpermitted construction. County officials determined that a significant amount of fill had been added to the site, the original one-story dwelling had been demolished, and a new garage had been constructed. A replacement two-story dwelling was partially constructed, and a section of the original dwelling's exterior wall had been retained onsite to screen the construction of the new first floor from public view. County officials also observed that the top portion of the north wall of the unpermitted garage and a portion of the new second-story construction of the dwelling had been painted to match the colors of the original wall to maintain the appearance of the original dwelling.

On May 11, 2007, the County issued a Notice of Violation (Building Violation Case No. 07BDV-00000-00020) to O'Neil for the unpermitted development. On June 15, 2007, O'Neil requested a 30-day time extension to respond to the Notice of Violation. On July 11, 2007, County officials were notified that unpermitted construction was continuing to occur at the site. County officials performed a site visit and determined that additional framing had occurred since the Stop Work Order was posted on March 22, 2007. During issuance of the Stop Work Notice, O'Neil again refused to cease construction of the unpermitted development, and County officials requested the presence of law enforcement to enforce the Notice. On August 1, 2007, O'Neil requested a second time extension to respond to the Notice of Violation. By October 19, 2007, O'Neil had not submitted another time extension request or responded to the Notice of Violation, and accordingly, County officials issued a second Notice of Violation. By January 9, 2008, O'Neil had not responded to the second Notice of Violation and County officials issued a third Notice of Violation. The County issued a fourth Notice of Violation on April 22, 2008, a fifth Notice of Violation on July 15, 2008, a sixth Notice of Violation on September 25, 2008, and a seventh Notice of Violation on April 8, 2009.

On July 30, 2008, O'Neil submitted a LCP amendment request for a rezone of the subject parcel from Recreation to Residential. On November 13, 2008, O'Neil submitted an associated Coastal Development Permit application in an effort to rectify the violations onsite and permit a new residence on the property. Between November 2008 and December 2014, the permit application remained incomplete.

Notably, on March 9, 2011, County staff sent a letter to O'Neil stating that "[t]here is no permit path for a Single-Family Dwelling in the REC zone district. Rezone of the subject property to REC zoning in 1984 indicates a deliberate and continued determination by the County that the property should revert to a recreational use upon discontinuance of the non-conforming residential use." In October 2014, O'Neil appealed the County staff's determination of permit application incompleteness, and in December 2014, the permit application was deemed complete due to the fact that the County did not render a decision regarding the appeal of the determination of permit application incompleteness by the close of the mandated 60-day deadline.

During the permit review process, County staff determined that O'Neil could not demonstrate that adequate legal access to the subject parcel exists. O'Neil disagrees with this conclusion and has attempted to demonstrate legal access. However, to date, O'Neil has been unable to demonstrate that adequate legal access to the subject parcel exists. In addition, County staff determined that a residential development of the subject parcel would raise issues with regard to the protection of visual resources within a designated view corridor overlay, the geologic instability of the site, and adverse impacts from shoreline and erosion hazards.

Based upon these issues, County staff determined that the proposed project-driven LCP amendment rezone request was not consistent with the County's certified LCP. On August 12, 2015, the County Planning Commission acted to recommend denial of LCP amendment rezone request and associated coastal development permit, consistent with County staff's recommendation, to the County Board of Supervisors. On November 3, 2015, the Board of Supervisors referred the LCP amendment rezone request and associated coastal development permit back to County staff and directed staff to initiate and complete all environmental review and to draft findings for approval in support of both proposed items. On February 27, 2018, after completion of additional environmental review, County staff brought the LCP amendment request and the associated coastal development permit to the Board of Supervisors hearing with a recommendation of denial once again, and the Board nevertheless directed staff to prepare the required findings for approval of both proposed items. On March 9, 2018, the County Board of Supervisors approved the LCP amendment request and associated coastal development permit (Exhibits 9-10).

On April 4, 2018, Commissioner Uranga and Commissioner Peskin filed appeals of the County's approval of the associated coastal development permit on the grounds that the approved development is inconsistent with the County of Santa Barbara's LCP policies and provisions regarding the protection of visual resources, minimization of risk from hazards, allowed uses given the certified land use and zoning designation of the property and application of the correct standard of review, and availability of adequate public services. On May 11, 2018, the applicant waived their right to a hearing with 49 working days of appeal filing in order to allow additional time for consideration of the related LCP amendment that is the subject of this staff report.

## **B. CONSISTENCY ANALYSIS**

The Coastal Act and the County's certified LCP place a high priority on the provision of recreational land uses within the Coastal Zone, such that recreational and open space land uses have priority over new residential development. Conversion of the subject parcel from recreation to residential land use and zoning designations would be inconsistent with the priority of land uses established by the Chapter 3 policies of the Coastal Act and the policy directives of the County's LUP to utilize the site for public

recreational and/or open space use once the legal non-conforming residential use of the property is abandoned or otherwise terminated.

In addition, the County's record for its approval of the LCP amendment request does not demonstrate that the subject parcel is suitable to allow for residential redevelopment of the site. Coastal Act Section 30250 requires new residential development to be located in areas able to accommodate such development, including areas that provide adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. The County's record for approval of the LCP amendment request indicates that there are questions regarding whether legal access to the subject parcel exists, and O'Neil has provided no evidence of an easement that would allow for legal access to the parcel or a connection to the public sewer line.

Further, the County's certified LCP designates the entirety of the subject parcel as a view corridor (Exhibit 7), and a residential development of the site has the potential to adversely impact public views of the ocean, inconsistent with the requirements of Coastal Act Section 30251 (Exhibit 8).

Lastly, the subject 0.10-acre parcel is located on a coastal bluff-top that is subject to erosion, with a bluff edge retreat rate estimated to be 0.36 feet per year, and that contains pockets of dumped, highly erodible and unstable fill material. A residential development of this parcel raises issues regarding the requirements of Coastal Act Section 30253 to minimize risks in areas of geologic hazard, to assure the stability and structural integrity of new development, and to neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area.

As noted above, the amendment proposes changes to the LUP and IP/CZO components of the certified County of Santa Barbara LCP. The standard of review that the Commission uses in reviewing the proposed LUP amendment is whether the LUP, as proposed to be amended, would remain consistent with the policies of Chapter 3 of the Coastal Act. The standard of review for the proposed amendment to the IP/CZO of the certified LCP, pursuant to Section 30513 of the Coastal Act, is whether the IP/CZO, as proposed to be amended, would remain in conformance with, and adequate to carry out, the provisions of the certified LUP portion of the County of Santa Barbara LCP. In addition, all Chapter 3 policies of the Coastal Act have been incorporated in their entirety into the certified LUP as guiding policies.

#### Relevant Coastal Act Policies

Section 30210 of the Coastal Act states:

*In carrying out the requirements of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Section 30221 states:

*Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

Section 30222 states:

*Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Section 30250 states, in relevant part:

*(a) 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 would not have significant adverse effects, either individually or cumulatively, on coastal resources...*

Section 30251 states, in relevant part:

*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 be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas....*

Section 30253 states, in relevant part:

*New development shall do all of the following:*

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs...*

#### Other Applicable County of Santa Barbara LCP Policies

LUP Policy 7-9 and its associated Implementing Action state, in relevant part:

*Additional opportunities for coastal access and recreation shall be provided in the Summerland planning area...*

*The County shall acquire the beach and bluff area south of Wallace Avenue. The parking area along Wallace Avenue shall be landscaped, and measures taken to minimize further erosion along the bluffs and railroad embankment...*

Summerland Community Plan Policy VIS-S-3 states:

*Public views from Summerland to the ocean and from the Highway to the foothills shall be protected and enhanced.*

#### Proposed Land Use and Zoning Designation Change

The subject 0.10-acre property currently has a land use and zoning designation of Recreation and the County is proposing to change the land use designation to Residential and the zoning designation to 7-R-1 (Single-Family Residential, 7,000 sq. ft./0.16-acre minimum lot size) pursuant to the LCP amendment request. Article II Section 35-89.1 of the County's certified IP/CZO provides the stated purpose of the Recreation District (REC) as follows:

*The purpose of this district is to provide open space for various forms of outdoor recreation of either a public or private nature. The intent is to encourage outdoor recreational uses which will protect and enhance areas which have both active and passive recreation potential because of their beauty and natural features. Such development should offer recreational uses which complement and are appropriate to the area because of these features.*

More broadly, Coastal Act Section 30210 requires the provision of public access and recreational opportunities, and Coastal Act Sections 30221 and 30222 reserve and protect oceanfront and upland land areas for recreational uses. In addition, the County's certified LUP contains policies and associated implementing actions regarding the provision of coastal access and recreation that are specific to the subject parcel and the beach and bluff area along Wallace Avenue. LUP Policy 7-9 requires the provision of coastal access and recreation in the Summerland planning area, and the associated implementing action states that the County shall acquire the beach and bluff area south of Wallace Avenue and take measures to minimize erosion along the bluffs and the existing railroad embankment.

In the 1890's, the subject parcel was developed to include a single-story residence. Between 1953 and 1958, the property was zoned as a "Beach Development District" which allowed a residential use of the property. County records indicate that in 1973 the subject property was assigned a land use designation of Recreation pursuant to the adoption of the County's Comprehensive Plan. In 1980, the County's LUP was certified and the Recreation land use designation of the subject site was carried over from the Comprehensive Plan. In 1984, the property was rezoned from Beach Development District to Recreation pursuant to the certification of the County's IP/CZO. The Recreation zone allowed public and private recreational uses but not residences. Therefore, by 1984 at the latest, the existing residence onsite became a legal, non-conforming structure and the residential use of the site became a legal, non-conforming use.<sup>1</sup> In 1992, the Summerland Community Plan was certified and the Recreation land use designation was once again carried over and certified for the site.

The County's rezone of the subject property in the 1980's from "Beach Development District" to Recreation was intended as a long-term planning effort to transition the property from a residential use to a recreation/open space use and to implement Land Use Plan Policy 7-9 and its associated implementing action listed above. This policy and its associated implementing action require the provision of opportunities for coastal access and recreation in the Summerland area and specifically mention the intent of the County to acquire the beach and bluff area south of Wallace Avenue (which includes the subject parcel) and recognize the need for the County to take measures to minimize further erosion along these bluffs by limiting future development in this area. In addition, the County's administrative record for the LCP amendment request contains internal notations made on zone change maps that demonstrate that the rezoning of this parcel from Beach Development District to Recreation

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<sup>1</sup> Staff would note that "residential structures for a caretaker" and "transitional and supportive housing" were added as a use permitted with a minor conditional use permit in the REC zone in 1992 and 2017, respectively. Neither of these use types have been proposed at this time as part of the project that gave rise to this proposed LCP amendment.

during certification of the IP/CZO was not intentional. Although the County's administrative record contains a few assertions by various County staff that the rezoning of the parcel to Recreation was not intentional, it also contains explicit statements by County staff to the contrary—that the rezoning was intentional and not in error. On balance, the record as a whole—including the certified land use planning policies that apply to this parcel—demonstrates that the rezone of the parcel was intentional.

The subject parcel is sited on an isolated coastal bluff-top property between the Pacific Ocean and the Southern Pacific Railroad Company (Railroad Company) tracks and is surrounded on all sides by land under the ownership of the Railroad Company (Exhibit 3). The closest existing residential development is 0.68 miles away to the east and 0.26 miles away to the west. The subject parcel is in close proximity to existing public recreation areas that include the public beach immediately seaward of the subject parcel, two public beach vertical accessways (one that is 0.53 miles to the east and one that is 0.11 miles to the west) on either side of the subject parcel, and Lookout Park, a 3.4-acre bluff-top park that overlooks the ocean and is sited 0.45 miles from the subject parcel. Notably, the Coastal Commission recently approved a project-driven LCP Amendment (No. LCP-4-STB-18-0071-2-Part A) submitted by the County that will implement public coastal access enhancements in this immediate area (as part of a transportation improvement project along the U.S. Highway 101 corridor between the City of Carpinteria and the City of Santa Barbara) that include benches and tables along the bluff-top on Finney Road, a new group picnic area with a barbeque facility, covered and uncovered seating areas, a walking path, and a public restroom at Lookout Park, and an increase of available public coastal access parking along Wallace Avenue. Although the questionable legal access to the subject parcel could render the site inappropriate for active recreational use, the public views through the site to the ocean and the location of the bluff-top parcel within an area of existing public recreational amenities makes the subject parcel ideal for passive recreational land use and/or open space land use. In addition, were the parcel ever to become publicly owned by the County, the County could obtain legal access, through eminent domain if necessary, to support new recreational uses of the site.

For the reasons below, amending the LUP in the proposed manner is not consistent with the Chapter 3 policies of the Coastal Act. Without the LUP amendment, the proposed IP/CZO amendment is inconsistent with the certified LUP's land use designation.

### Legal Access

As mentioned above, the administrative record for the approval of the subject LCP amendment indicates that there are significant questions regarding whether legal access to the subject parcel exists. The County Planning Commission originally found that the segment of Wallace Avenue located immediately north of the subject parcel was legally quitclaimed by the County to the Railroad Company in 1901 (pursuant to Ordinance No. 247) and has been owned by the Railroad Company ever since. The Planning Commission further found that O'Neil did not establish that he has any agreement in place with the Railroad Company to use this segment of Wallace Avenue for access to the subject parcel. The findings adopted by the Planning Commission further note that the northwestern corner of the lot touches the southeastern corner of the publically owned portion of Wallace Avenue at only a single point; and, further, that a single point in space does not constitute adequate, legal access because the applicant could not practically construct a road to access the parcel using a single point. Although the County Board of Supervisors ended up overturning the Planning Commission's denial of the CDP, and thus implicitly rejected the Planning Commission's access-related findings, it did not adopt new findings based on new evidence regarding legal access. Based on the evidence in the record, the Commission finds that significant questions remain regarding whether adequate legal access exists to support continued or expanded residential uses of this parcel.

The applicant has argued that the County did not possess ownership of Wallace Avenue at the time it purported to quitclaim the subject segment to the Railroad Company, and the subject segment is owned by a trust set up by the original owner (H. L. Williams) of the land upon which the community of Summerland was developed. O'Neil further asserts that he, the County, and the Railroad Company have acquired prescriptive rights to lawfully utilize the segment of Wallace Avenue immediately north of his parcel due to their continued use of this roadway over the course of many years. However, these alleged prescriptive rights have not been adjudicated, and assertions of un-adjudicated prescriptive rights do not constitute sufficient evidence upon which the Commission has historically relied when analyzing the issue of legal access.

Therefore, the applicant has not demonstrated that legal access to the subject parcel exists, and a land use designation change of the subject parcel from Recreation to Residential to allow for continued or expanded residential development of the parcel is inconsistent with the requirement of Coastal Act Section 30250 to locate new residential development in areas able to accommodate such development.

### Hazards

Coastal Act Section 30253 requires new development to minimize risks to life and property in areas of high geologic hazard, assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or the surrounding area. Further, Section 30253 specifies that new development must not rely on the construction of shoreline protective devices.

As part of the related coastal development permit that was approved by the County for residential development of the site, the County required a site-specific geotechnical report. The retreat rate for the coastal bluff immediately seaward of the subject property was estimated to be 0.36 feet per year (Evaluation of Bluff Stability and Seacliff Retreat, Michael Hoover, January 6, 2012). However, a peer review of the applicant's geotechnical report commissioned by the County (GeoDynamics, Inc., July 2, 2015) states that the bluff retreat rates immediately to the east and west of the subject site have been estimated to be 0.52 feet per year, and that the Hoover estimated rate of 0.36 feet per year is not substantiated by sufficient evidence. The peer review further concludes that the geotechnical report submitted by the applicant fails to consider the impact that a thick wedge of dumped fill that underlies the section of bluff seaward of the subject parcel has upon the calculated bluff retreat rate. The dumped fill has been determined to be loose and easily erodible (CFG 1995; Fugro 2003), and the applicant's submitted report does not consider the potential for catastrophic loss of the fill wedge due to failure, erosion, and wave attack during storm events. The applicant's report relies on the presence of unpermitted (though possibly pre-Coastal Act) rip rap at the toe of the subject bluff to lower the bluff retreat rate; however, pursuant to Coastal Act Section 30253, new development shall not rely upon construction of shoreline protective devices that substantially alter natural landforms along bluffs and cliffs. Thus, when determining whether rezoning the subject parcel for residential development is consistent with Coastal Act requirements, one consideration is whether new residential development of the subject bluff can meet adequate factors of safety and remain structurally stable without the need for additions to the existing, or construction of new, shoreline protection.

Additionally, the applicant's assertion that the retreat rate of the bluff directly seaward of the subject property is lower than other areas of this bluff is likely incorrect. The wedge of loose fill material that underlies the bluff at the property site, as described above, has a higher potential retreat rate than the surrounding natural bluffs that are underlain by consolidated bedrock and older alluvial deposits. The

peer review asserts that potential failure planes within the existing fill are expected to have factors of safety below the minimum requirements of 1.5 and 1.1 for static and pseudostatic loading, respectively. The applicant responded to the assertions made by the peer review (Hoover, October 23, 2015) and acknowledged that the potential for a failure of the loose fill material demonstrates a factor of safety less than 1.5 (static). The applicant's response further acknowledges that pseudostatic stability was not analyzed for this issue. To address this inadequate factor of safety, the applicant's geologist suggests the installation of a bluff stabilization device or shoreline protective device to prevent such a failure. For these reasons, it has not been demonstrated that residential development of the site can be accommodated in a manner that minimizes risk from hazards and avoids landform alteration and reliance on construction of shoreline or bluff protection devices consistent with the requirements of Coastal Act Section 30253.

In reviewing the methodology utilized in the applicant's report for the calculation of the appropriate coastal bluff setback for new development on the subject site, the peer review of the applicant's report identifies errors in the methodology applied. Although the County required the applicant to provide a coastal hazard and wave runup study (GeoSoils, Inc., May 31, 2016) to analyze the potential for adverse impacts from coastal hazards on the proposed new residential development on the subject parcel, neither the coastal hazard and wave runup study nor the site-specific geotechnical report (Hoover, 2012) analyze the impacts of sea level rise flood projections, shoreline change models that take sea level rise into account, or future increases in storm events upon the estimated bluff retreat rate for the site. Instead, the estimated bluff retreat rate for the site provided by the applicant is only based upon historic retreat rates and a bluff stability analysis. Therefore, the estimated bluff retreat rate provided by the applicant likely underestimates the bluff retreat rate at the subject site. The peer review notes that the applicant's report measured the calculated setback distance from the top of the bluff to conclude that the proposed siting of new development meets the bluff setback requirements. However, the peer review clarifies that the bluff setbacks must be measured from the point where the setback line depicting a 1.5 factor of safety intersects the pad grade. Methodology consistently used by the Coastal Commission in the review of bluff top development (as detailed in the Memorandum regarding "Establishing development setbacks from coastal bluffs" dated January 16, 2003) specifies a bluff retreat setback should be provided *in addition* to the distance required to obtain the prerequisite factors of safety (1.5 and 1.1 for static and pseudostatic loading conditions, respectively). Due to the fact that an appropriate coastal bluff setback for new development on the subject site has not been properly determined, it has not been demonstrated that a residential development of the subject parcel will minimize risks to life and property in this area of high geologic hazard or assure the stability and structural integrity of new development on the site, consistent with the requirements of Coastal Act Section 30253.

Further, the land use designation change of the subject parcel from Recreation/Open Space to Residential and the zoning change from Recreation to Residential to allow for a new home and conforming residential use of the site should only be allowed in such cases where a site will be able to support a residential use for the foreseeable future. Unlike residential structural development, where the Commission generally analyzes whether the structure will be stable and safe for its expected life of 75 to 100 years, the land use designation change of a parcel would be more or less permanent. Thus, a proposed land use designation change should be analyzed to determine whether new, allowed uses could be constructed in a location and in a manner in which they will be stable, without the need for shoreline protection that has coastal resource impacts, for the foreseeable future.

As shown in Exhibit 3, the subject parcel is sited between railroad tracks to the north and a railroad-owned parcel to the south. The railroad-owned parcel (approximately 30 feet deep) to the south



predominately consists of the face of the coastal bluff, and the subject O'Neil property (approximately 60 feet deep) is sited on top of the coastal bluff. In this case, 0.36 feet per year of bluff retreat will mean that there will only be approximately 54 feet of land (depth of parcel) available to accommodate the development of a home in 100 years and approximately 36 feet of land available to accommodate the development of a home in 150 years. If a bluff retreat rate of 0.52 feet per year is applied, there will be approximately 38 feet of land for a home in 100 years and approximately 12 feet of land for a home in 150 years. It is important to note that the application of the two bluff retreat estimates (i.e., 0.36 feet per year and 0.52 feet per year) herein to the subject parcel does not include a measurement of these estimated bluff retreat rates from the 1.5 factor of safety line. Accordingly, there is likely to be significantly less available buildable area than estimated directly above for future residential development on the parcel since the estimated bluff retreat rate will be measured from the 1.5 factor of safety line to determine the necessary coastal bluff setbacks for any new development on the site. These estimated bluff retreat rates strongly suggest that a residential development of the site will not be possible without the installation of shoreline protection at the toe of the bluff. Such an installation would substantially alter the natural landforms along the bluffs at the site, inconsistent with the requirements of Section 30253.

### Visual Resources

Coastal Act Section 30251 protects the scenic and visual qualities of coastal areas as a resource of public importance. Section 30251 further requires permitted development to be sited and designed to protect views to and along the ocean and to be visually compatible with the character of surrounding areas. Furthermore, Summerland Community Plan Policy VIS-S-3 states that public views from Summerland to the ocean shall be protected and enhanced. As discussed above, the subject parcel is sited on an isolated coastal bluff-top property between the Pacific Ocean and the Southern Pacific Railroad Company (Railroad Company) tracks, and the closest existing residential development is 0.68 miles away to the east and 0.26 miles away to the west. The subject parcel is surrounded by undeveloped land owned by the Railroad Company (Exhibit 3) and existing public recreation and open space areas.

Furthermore, the subject parcel is located seaward of a stretch along Highway 101 that contains broad, virtually unobstructed ocean views. The property is visible from Lillie Avenue (including the bike trail and sidewalk), Greenwell Avenue at Lillie Avenue, the north and southbound lanes of Highway 101 (Exhibit 8), and the public beach immediately seaward of the site. Additionally, the subject parcel is located within a designated view corridor overlay (Exhibit 7) that limits the height of all development within the overlay to a maximum of 15 feet. The existing partially constructed and unpermitted two-story residence onsite currently blocks public ocean views from Lillie Avenue (including the bike trail and sidewalk), Greenwell Avenue at Lillie Avenue, and from the north and southbound lanes of Highway 101 (Exhibit 8). Any further residential development of the subject site would be visible from the public beach immediately seaward of the parcel and has the potential to obstruct public blue water views from the public viewing areas listed above. Future development of the surrounding properties will be limited to transportation related development (e.g., railroad tracks) and public recreation and open space areas, and therefore, the proposed residence will continue to be isolated over the long-term. Conversion of the property from a recreational/open space to residential land use designation in such a highly visible area would allow for residential development of the site that would likely adversely impact public views of the ocean. Accordingly, such a conversion is not consistent with Section 30251 of the Coastal Act or Summerland Community Plan Policy VIS-S-3.

### Conclusion

For the reasons described above, the proposed request to change the land use and zoning designation of the subject parcel from Recreation/Open Space to Residential is inconsistent with the new development, coastal hazard, and visual resource policies of the Coastal Act (for the proposed LUP changes), and with the certified County LCP, including incorporated Coastal Act policies (for the proposed IP/CZO changes). In addition, without the proposed LUP amendment, the proposed IP/CZO amendment is not in conformity with, and is inadequate to carry out, the certified LUP because the residential zoning designation is inconsistent with the land use designation. For all of these reasons, the proposed LCP amendment is denied.

### **C. DENIAL OF LCP AMENDMENT NOT A TAKING**

When the Commission denies a project or LCP amendment, a question may arise whether the denial results in an unconstitutional “taking” of property without payment of just compensation. The owner of the affected property, in a March 28, 2018 letter to the Commission, raises an argument that, if the Commission denies him the right to rebuild his home, it would constitute a taking. Coastal Act Section 30010 addresses takings and states as follows:

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 therefor. 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.

Permit is defined in Section 30110 of the Coastal Act as follows:

“Permit” means any license, certificate, approval, or other entitlement for use granted or denied by any public agency which is subject to the provisions of this division.

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the assurance that its actions are consistent with Section 30010. The Commission has the authority, under Section 30010, to approve some level of development otherwise inconsistent with Coastal Act policies in order to avoid a “taking.” (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 272; *Surfrider Found. v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 257–58.)

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the LCP amendment would constitute a taking. The Commission finds that its denial of the proposed land use designation and zoning change does not create a ripe takings claim.

#### General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>21</sup> 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.” The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. 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). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee*, supra, 503 U.S. at pp. 522- 523). A taking is less likely to be found when the interference with property is an application of a regulatory program (a “regulatory taking”) rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18).

The Commission’s actions here would be evaluated under the standards for a regulatory taking. Under the U.S. Constitution a “takings” claim must be “ripe” in order for it to be properly presented for consideration. To be “ripe” a taking claim must be based on a “final determination” by a governmental body of the uses to be allowed on a particular parcel of land. (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606 [claim was ripe where proposal to fill wetlands was not accepted and did not qualify for special exception for ‘compelling public purpose’]; *Agins v. Tiburon* (1980) 447 U.S. 255, 260 [“[b]ecause the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions”]). The takings claimant must show that government has made a “final and authoritative” decision about the use of the property. (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 21, overruled on other grounds in *Knick v. Twp. of Scott, Pennsylvania* (U.S. June 21, 2019), No. 17-647, 2019 WL 2552486, at \*7).

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); *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348.) Premature adjudication of a takings claim is highly disfavored, and the Supreme Court’s cases “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it” (*MacDonald*, 477 U.S. at p. 351). For example, in both *Williamson* and *MacDonald* the Supreme Court required the submission and resubmission of applications for development projects or variances before a takings claim would be ripe for adjudication.

#### Before a Landowner May Establish a Taking, Commission Must Have Made a Final Determination Concerning the Use to Which the Property May Be Put

Following the U.S. Supreme Court precedent described above, California courts have stated the same prerequisites in order to establish a ripe takings claim: “(1) a rejected development plan and (2) a denial of a variance.” (*Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1454, amended, 830 F.2d 968 [claim not ripe because property owner did not apply for a development permit prior to filing suit]; *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d. 1016, 1032 [claim not ripe because developer did not seek annexation or variances, and, after rezoning to open space, did not apply for permits: “The developer must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied.”]; *Toigo v. Town of Ross* (1998) 70 Cal.App. 4th 309, 324 [takings claim rejected as unripe

where plaintiff failed to apply for approval of lower density project than one for which application originally denied].)

The Commission employs this same test in reviewing takings claims presented to it under § 30010.

Under California law a claim of a “taking” based on a zoning decision or action on a rezoning request is not ripe in the absence of an application for approval of specific development proposal. (*See e.g. Shea Homes, Ltd. Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1267 and *County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558 [landowners’ claims that amended county area plan that reserved land for agricultural and open space was a taking was not ripe because landowners had not submitted development proposal and because of “the flexibility afforded the County [by a “takings override” provision] to avoid any potentially unconstitutional application of [applicable development restrictions.]”])

Reviewing courts have applied the ripeness test to claims for compensation for a “taking” on the basis of regulatory actions taken by the Commission. More specific to the instant matter, courts have also rejected takings claims made against the Commission in certification of LCPs as unripe. (*Beach & Bluff Conservancy*, 28 Cal.App.5th at 271-72 [rejecting facial takings challenge to LCP amendment, finding it “not ripe for adjudication until there has been a final, definitive, position regarding how the City will apply the challenged enactment to the complaining party's land.”]; *Sierra Club v. California Coastal Com'n* (County of Mendocino, RPI) (1993) 12 Cal.App.4th 602, 618-619 [discussing the County’s desire to make anticipatory takings balance in certification of LUP’s ESHA policies, the court rejected these concerns as unripe: “Further defeating the County's construction, section 30010 speaks of permit-stage actions, not LUP or LCP approvals. This is consonant with the judicial view that takings decisions must await as-applied challenges and are usually not ripe until the permit stage.”]; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 546- 547 [property groups unsuccessfully challenged LCP amendment passed by initiative claiming that amended LCP was a taking “as applied” and on its face: “[A]ppellants' claim that Measure A was unconstitutional “as applied” to their properties does not present a concrete controversy ripe for adjudication because they have not submitted a subdivision plan or applied for a permit or variance from the local authority which has been conclusively denied (or in this instance subjected to the easement requirement) and, as in the case of the Monterey County LCP, Measure A provided for a takings override: “The County has the flexibility to avoid potentially unconstitutional application of easement requirements, should these requirements “go too far” as specifically applied to a particular parcel of property.”])

Here, the landowner has submitted a project proposal for a new home, and the County approved a CDP for the proposed home (contingent on certification of the LCP amendment). That permit has been appealed to the Coastal Commission, where it is now pending. As described above, in the context of permit actions such as the one now on appeal, the Commission may permit development that is otherwise inconsistent with the Coastal Act or an LCP if necessary to avoid an uncompensated taking. Thus, the denial of the proposed rezone, by itself, does not constitute a final decision that no residential use may be made of the property. Nor does it address whether other, economically meaningful, conforming uses may be made of the property. If and when the Commission finds that the appeal raises a substantial issue, and if and when it then acts on the pending, appealed permit application in a de novo hearing, it can at that time consider whether it must permit some amount of new residential development on the lot in order to avoid an uncompensated taking. In order to make such a determination, the Commission would likely need to consider, among other things:

- Whether denial of a permit for a new residence would deprive the owner of all economic use of the property, or whether the owner has any reasonable economic uses of the property that conform with current LCP designations and policies
- Whether the proposed residence is the minimum amount of development necessary to avoid a taking, and whether it is the least environmentally damaging alternative
- The extent of the owner's reasonable, investment-backed expectations in having a residential use of the property, or in having a particular type or size of residence. This inquiry may include consideration of:
  - The history of zoning and land use designations for the property
  - Whether the non-conforming residential use of the property was abandoned when the applicant knowingly, and without permits, demolished the then-existing, legal, non-conforming home on the property
  - Whether, if the owner still has a right to a non-conforming residential use, a larger home than previously existed would enlarge, expand, or extend that non-conforming use, in conflict with LCP provisions that are intended to limit the survival and expansion of non-conforming uses
  - The owner's purchase date and price for the property, the fair market value of the property prior to the owner's unpermitted demolition of the then-existing, legal, non-conforming home, and the fair market value of the property now if a new residential use is not permitted
  - Whether the owner has solicited or received any offers to purchase or lease the property, such as from the Railroad Company or others
  - Whether the owner's, and his predecessors' use of the property for a non-conforming residence for a number of decades effectively provided an amortization period commensurate with the investment in the property, such that termination of the non-conforming residential use does not "go too far" or take all economic use of the property

Therefore, the Commission has had no opportunity to make any final determination about what use could be made of the land, and it would need more information at the time of any future, final permit determination before it could assess whether denial of permit for a new residence would constitute an uncompensated taking.

Further, denial of the land use designation and zone change must be understood in the context of the property's history. From 1996, when the current owner purchased the property, until approximately 2007, when he knowingly and intentionally demolished the then-existing home after being denied a permit to do so, he had the use of a legal, non-conforming home on the property. Were it not for the owner's unpermitted actions, he would still have use of that home, with all attendant rights to repair and maintain it (but not to enlarge or expand it).<sup>2</sup> Thus, denial of the land use designation and zone change are not the true cause of the owner's lack of a current residence on the property, and any takings analysis related to this LCP amendment action should account for this fact. As courts have held, "[t]he constitutionality of the ordinance or of its application to particular property must be determined upon the basis of the facts and conditions as they existed prior to the time plaintiff proceeded in disregard of the ordinance, and the court must wholly ignore conditions which resulted from the plaintiff's actions." (*Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 342.) Here, to the extent that the owner claims that he lacks a reasonable, economic use of the property because it has

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<sup>2</sup> See IP/CZO § 35-160 (providing policies governing termination and expansion of non-conforming uses, including non-conforming residential uses).

no home on it, it is because he has caused that condition. He should not be able to put himself in a stronger legal position to assert a takings claim—i.e., by claiming that he has little or no economic use of the property because he has been denied the right to build a home—by result of his unpermitted actions to demolish the then-existing, legal use of his property. “‘No one can take advantage of his own wrong’ (Civ. Code, § 3517), and [a party] should not be permitted to benefit from his own wrongdoing.” (*Wilkins*, 29 Cal.2d at 342.)

### Conclusion

For all of the above reasons, the Commission concludes that its denial does not constitute a taking because the claim is not ripe, and, therefore, the Commission’s action is consistent with Coastal Act Section 30010.

### **D. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the Commission’s administrative regulations requires Commission approval of a Local Coastal Program amendment to be supported by a finding showing the amendment is consistent with any applicable requirement of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) prohibits a regulatory program from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the proposed regulatory program may have on the environment.

The Commission incorporates its findings on Coastal Act consistency at this point as if set forth in full. As discussed above, the proposed land use designation and zoning change is not consistent with the policies and provisions of the Coastal Act or the County of Santa Barbara’s certified Local Coastal Program. There are feasible alternatives that would avoid the adverse environmental effects of the proposed LUP and IP/CZO amendment for the reasons listed in this report. Therefore, the Commission finds that the proposed amendment is not consistent with the requirements of the Coastal Act to conform to CEQA. 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 the 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 were approved. 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.