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# W13a

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Staff: Brian O'Neill - SC  
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Hearing Date: 2/12/2020

## APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION & DE NOVO HEARING

**Application Number:** A-3-SLO-19-0195

**Applicant:** John Swift

**Appellants:** Commissioners Linda Escalante and Katie Rice

**Local Government:** San Luis Obispo County

**Local Decision:** San Luis Obispo County Coastal Development Permit Application Number DRC2019-00013, approved by the San Luis Obispo County Planning Department on August 2, 2019

**Project Location:** Undeveloped property at 5752 Moonstone Beach Drive in the unincorporated community of Cambria in San Luis Obispo County (APN 022-053-041)

**Project Description:** Construction of a 2,944-square-foot, two-story single-family dwelling with an attached 524-square-foot garage, and associated grading and landscaping improvements on a 7,780-square-foot vacant parcel

**Staff Recommendation:** Substantial Issue Exists; Denial

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**Important Hearing Procedure Note:** The Commission will not take testimony on this “substantial issue” recommendation unless at least three Commissioners request it. The Commission may ask questions of the Applicant, any aggrieved person, the Attorney General or the Executive Director prior to determining whether or not to take testimony regarding whether

the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally (and at the discretion of the Chair) limited to three minutes total per side. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the *de novo* phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony. (California Code of Regulations, Title 14, Sections 13115 and 13117.)

## **SUMMARY OF STAFF RECOMMENDATION**

San Luis Obispo County approved a coastal development permit (CDP) for the construction of a 2,944-square-foot, two-story single-family dwelling with an attached 524-square-foot garage, and associated improvements on a 7,780-square-foot vacant parcel property on the inland edge of the community of Cambria in unincorporated San Luis Obispo County. The Appellants contend that the County's action is inconsistent with numerous policies and standards in the County's certified Local Coastal Program (LCP), including primarily those related to water supply and sensitive habitats. Following review of the local record, staff recommends that the Commission find that the County's approval of the project raises a substantial LCP conformance issue, that the Commission take jurisdiction over the CDP application, and that the Commission deny that CDP application due to significant LCP inconsistencies.

The County's action raises substantial LCP water resource and sensitive habitat issues because: (1) the County did *not* determine that there was an adequate sustainable water supply to serve the project as is required by the LCP, but rather relied solely on a Cambria Community Services District (CCSD) intent-to-serve (or "will serve") letter for this purpose; (2) there is *not* an adequate sustainable water supply to provide new water service to serve new development in Cambria (and it is not adequate even for existing development), a factual finding that has been repeatedly determined by the Commission in relation to Cambria development through multiple actions, including certification of LCP provisions (specific to the present lack of available water and imposing specific water supply requirements) and CDP actions; (3) the sources of Cambria's water supply (i.e., Santa Rosa and San Simeon Creeks) are environmentally sensitive habitat areas (ESHA) that are *currently* being adversely affected by *existing* water extractions to support *existing* development in Cambria; and (4) the County found that the project could be served by the community's already oversubscribed water supply because the project would be required to comply with the CCSD's retrofit program designed to offset water use, but such offsets would be inadequate to meet LCP standards with respect to adequate sustainable water supply, and the CCSD's program does not appear to actually offset such water use even if it were to be deemed an appropriate tool to meet LCP standards, which it is not.

The proposed project is located in an area where existing water extractions to serve the community already and significantly adversely affect significant coastal resources, including Santa Rosa and San Simeon Creeks and associated sensitive riparian habitats. The CCSD declared a water moratorium prohibiting new connections in 2001 as a means to help address the problem, and that moratorium remains in effect. The moratorium and the applicable LCP provisions based on it that were certified by the Commission in 2007 *only* allow new water service to a handful of proposed development projects that were pending before the County at

the time of the moratorium and the LCP amendment, and that the CCSD had already committed to provide water for (known as “pipeline projects”), and only when such pipeline projects institute required offsets designed to “back out” such additional demand on already oversubscribed water supplies. This exception from the moratorium for these pipeline projects was not due to any finding that they would not lead to harm to the Creeks from adding more water demand to the system; rather it was considered a matter of equity and fairness to honor commitments made at the time (with potential attendant legal risks if such commitments were not recognized), provided they were strictly limited in the manner described above, and the Commission agreed to this scheme in the 2007 LCP amendment. There were originally a limited number of these “grandfathered” pipeline projects, but there are no more such pipeline projects pending today. As a result, the cumulative effect of the moratorium and the certified LCP is that currently the LCP effectively prohibits approval of new water service in Cambria, taking into account the actual facts and reality on the ground, and does so in this case.

Notwithstanding these clear points about the LCP, the CCSD has continued to offer to provide new water services for proposed development that do not constitute “pipeline projects,” as it did here, and the County has on occasion approved development based on CCSD intent-to-serve letters to that effect, as it did here. In fact, in November 2019 the Commission unanimously denied a CDP on appeal for a new residence in Cambria for the exact issues raised in the current appeal. There are significant precedential LCP interpretation and coastal resource concerns with the County’s approach to approving projects given the context of inadequate regional water supply, including the effect of same leading to new water extraction demands on already oversubscribed Santa Rosa and San Simeon Creeks. This is particularly concerning as the CCSD has indicated that it would provide intent-to-serve letters to provide new water service to over *130 additional new projects* not on the pipeline projects’ list, and the CCSD further indicates that it believes it has the authority to increase that number as much as it wants. And because the County has stated that it deems such intent-to-serve letters as sufficient to determine that there is adequate water to serve new development, notwithstanding LCP provisions to the contrary that are specific to Cambria’s water supply, the County’s action in this case raises serious issues regarding LCP water resource and sensitive habitat protections, including in terms of the effect of the County’s position on interpretation of the LCP in future Cambria projects, where some 130 intent-to-serve letters (or more) await future County action.

Staff recommends that the Commission find that the County’s action raises a substantial LCP conformance issue and that the Commission take jurisdiction over the CDP application. Due to the above LCP water supply inconsistencies, and the lack of available water to serve even *existing* development in Cambria let alone new water service to facilitate new development, staff further recommends that the Commission, on de novo review, deny the CDP. The motions and resolutions to do so are found on page 5 below.

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Exhibit 4 – County’s Final Local CDP Action Notice

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## I. MOTIONS AND RESOLUTIONS

### A. Substantial Issue Determination

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo hearing and action. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in a de novo hearing on the CDP application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of no substantial issue and the local action will become final and effective. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-SLO-19-0195 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and I recommend a no vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-SLO-19-0195 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified San Luis Obispo County Local Coastal Program.*

### B. CDP Determination

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in denial of the CDP and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-SLO-19-0195 for the development proposed by the applicant, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-SLO-19-0195 on the grounds that the development will not be in conformity with the San Luis Obispo County Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

## **II. FINDINGS AND DECLARATIONS**

The Commission finds and declares as follows:

### **A. PROJECT LOCATION**

The proposed project is located on a 7,780-square-foot vacant parcel on the seaward edge of the community of Cambria in unincorporated San Luis Obispo County at 5752 Moonstone Beach Drive. Cambria is a small residential and tourist community within the Local Coastal Program's (LCP's) North Coast Planning Area just south of Hearst Castle. The project site is west of Highway 1 and is directly adjacent to Moonstone Beach Park and Santa Rosa Creek. The project site is vacant and surrounded by existing single-family dwellings. The site slopes to the north and is covered primarily with landscaped grass. The parcel is zoned Residential Single-Family, which allows for one housing unit per 6,000 square feet, which in this case would allow for one unit on this site. See **Exhibit 1** for project location maps and **Exhibit 2** for photos of the project site.

### **B. PROJECT DESCRIPTION**

The County's approval authorized the construction of a 2,944-square-foot, two-story single-family dwelling with an attached 524-square-foot garage, and associated grading and landscaping improvements. The project would result in disturbance of the entire 7,780-square-foot parcel. See the County's conditions of approval and approved project plans in **Exhibit 3**.

### **C. SAN LUIS OBISPO COUNTY APPROVAL AND APPEAL HISTORY**

On August 2, 2019 San Luis Obispo County approved a CDP for the proposed project (County CDP Application No. DRC2019-00013). Notice of the County's final action on the CDP was received in the Coastal Commission's Central Coast District Office on August 22, 2019 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on August 23, 2019 and concluded at 5 pm on September 6, 2019. One valid appeal was received during the appeal period. See **Exhibit 5** for the full text of the appeal.

### **D. APPEAL PROCEDURES**

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, or (3) in a sensitive coastal resource area; and (4) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. The County's approval of this project is appealable because the proposed development is located within a designated sensitive coastal resource area under the LCP. Although the County did not identify other potential categories that would cause the project to be appealable, the project site

also appears to be within 100 feet of a wetland, estuary or stream and within 300 feet of the top of the seaward face of any coastal bluff. The project is also appealable because the zoning district for the project designates more than one principally permitted use and thus all “principally permitted uses” are appealable per Coastal Act section 30603(a)(4).

The grounds for appeal under Section 30603(b)(1) are limited to allegations that the development does not conform to the certified LCP and/or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to consider a CDP for an appealed project de novo unless a majority of the Commissioners present finds that “no substantial issue” is raised by such allegations. Under Section 30604(b), if the Commission conducts the de novo portion of an appeal hearing (following a determination of “substantial issue”) the Commission must approve a CDP if it finds the proposed development consistent with the certified LCP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is not located between the nearest public road and the sea (or the shoreline of a body of water located within the coastal zone), and thus this additional finding would not need to be made if the Commission were to approve the project following a de novo hearing.

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

## **E. SUMMARY OF APPEAL CONTENTIONS**

The appeal contends that the County-approved project is inconsistent with numerous San Luis Obispo LCP groundwater resources and water supply provisions, including those that prohibit new development in Cambria that will impact Santa Rosa and San Simeon Creeks, and that require new development to demonstrate an adequate water supply to serve it. The appeal also states that the water retrofits that were installed for the project are inadequate to offset the proposed water use. See **Exhibit 5** for the Appellants’ appeal documents and contentions.

## **F. SUBSTANTIAL ISSUE DETERMINATION**

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603. (§ 30625(b)(2).) Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government’s decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor.

Even where the Commission chooses not to hear an appeal, Appellants nevertheless may obtain judicial review of the local government's CDP decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

In this case, for the reasons discussed further below, the Commission determines that the County's approval of a CDP for the project raises a substantial LCP conformance issue.

## **1. Water Supply**

### **Cambria Water Supply Background**

Cambria's water supply depends entirely on the groundwater aquifers associated with Santa Rosa and San Simeon Creeks (collectively "the Creeks"). The Creeks flow from their respective headwaters and both terminate into lagoons, which ultimately connect to the Pacific Ocean. In addition to the domestic and agricultural demands for water upstream, environmental demand in the form of adequate instream flows is necessary to sustain the Creeks' high quality habitat for a variety of aquatic and terrestrial species. The United States Fish and Wildlife Service (USFWS) designates the Creeks as critical habitat because they provide habitat for federally threatened South-Central Coast Steelhead and federally endangered Tidewater goby.

The Cambria Community Services District (CCSD) operates groundwater wells in the lower reaches of the Creeks to extract water from their respective groundwater aquifers to serve the demand of Cambria's urban water users. Prior to 1977, all of Cambria's water was extracted from wells along the lower reaches of Santa Rosa Creek, which produced approximately 400 acre-feet of water a year (afy). Due to contamination from high levels of total dissolved solids, this water supply was determined to be unsuitable for human consumption. Additionally, the water supply was severely limited, including because of a lack of in-stream flow necessary to provide adequate protection for riparian fisheries and other related resources, and water use in the community was strictly rationed to a maximum of 50 gallons per person per day.

Due to these water supply problems, the CCSD applied to the State Water Resources Control Board (SWRCB) for the rights to withdraw a total of 1,230 afy of groundwater from the nearby (i.e., just north of the community and north of Santa Rosa Creek) San Simeon Creek basin annually. According to the final EIR for that water rights application, the proposed water extractions were found to have the potential to adversely affect riparian habitat and degrade anadromous fish resources, particularly steelhead trout. Due to these identified impacts, the California Department of Fish and Wildlife<sup>1</sup> (CDFW) protested the CCSD's water rights application. CDFW eventually withdrew its protest when the CCSD agreed to two conditions of approval. First, CCSD agreed to maintain water levels in the basin to sustain stream flow to the lagoon to protect fish and riparian habitat. Second, the CCSD agreed to maintain irrigation facilities in order to maintain riparian vegetation. Based upon information that suggested the San Simeon Creek basin would not be able to safely and reliably produce 1,230 afy under these terms, the CCSD also sought approval to supplement this San Simeon water supply with continued withdrawals from the Santa Rosa Creek basin in order to maintain service to existing customers in times of emergency. SWRCB ultimately approved the CCSD's application for

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<sup>1</sup> At the time the agency was called the California Department of Fish and Game.



water rights to annually extract 1,230 afy total from San Simeon Creek and Santa Rosa Creek combined, subject to the CDFW's conditions.<sup>2</sup>

CCSD's groundwater extractions were then permitted pursuant to CDP 428-10, as amended, which the Commission initially conditionally approved in 1977, shortly after the enactment of the Coastal Act. The Commission found that, although the proposed 1,230 afy of water withdrawals from San Simeon Creek had the potential to adversely impact biological resources, the project could be found consistent with the Coastal Act because the CCSD proposed as part of the project CDFW's conditions that required the District to maintain stream flow and irrigate vegetation in order to maintain and protect riparian habitat. The primary intent of these Creek-protective measures was and is to ensure that adequate water remains instream to support the Creeks' sensitive riparian habitats, and to prevent overdraft of the groundwater aquifers.<sup>3</sup> In addition to these measures to protect San Simeon Creek, the Commission found that Santa Rosa Creek is "the most important anadromous fish stream in San Luis Obispo County" and therefore required CCSD to discontinue its use of wells along Santa Rosa Creek as its primary water supply once the San Simeon Creek wells were established. Withdrawals from the Santa Rosa Creek wells are therefore *only* allowed pursuant to the CDP to *supplement* the CCSD's water supply in an emergency when water cannot be safely removed from San Simeon Creek. Notwithstanding this CDP requirement and limitation, according to the CCSD's records, since 1988 water withdrawals from Santa Rosa Creek have occurred every year except one.

Since the time of its initial 1977 approval of the CCSD's CDP for water extractions from the Creeks, the Commission has continually expressed concern regarding Cambria's capacity to maintain a reliable and environmentally sustainable water supply.<sup>4</sup> In fact, as the Commission has made clear in the 2007 LCP North Coast Area Plan Update and in multiple appeal/CDP cases,<sup>5</sup> the existing water supply does not represent an adequate and sustainable supply that can serve even *existing* development in Cambria without significant resource harm, consistent with

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<sup>2</sup> SWRCB recently reduced the amount of water that CCSD could extract from the Creeks to less than the level allowed under their original 1977 approval, particularly during the dry season (see "*Issuance of Water Right Licenses 13916 and 13917*," SWRCB, March 14, 2019). SWRCB's 2019 water right license materials reduce CCSD's allowed extractions from the Creeks to no more than 1,017 afy (i.e., a maximum of 799 afy from San Simeon Creek, where no more than 370 afy of that extraction can be during the dry season, and a maximum of 218 afy from Santa Rosa Creek where no more than 155.3 afy of that extraction can be during the dry season), all still subject to the same terms and conditions, including regarding maintaining water levels in the basin to sustain stream flow to the lagoon to protect fish and riparian habitat.

<sup>3</sup> Overdraft occurs when water is pumped beyond the safe yield of a groundwater aquifer, leading to adverse impacts, such as subsidence, in which an aquifer's geological structures compress, which may result in irreparable damage to an aquifer's capacity to store water. When such groundwater is associated with rivers and streams, other adverse impacts can include a reduction in flows necessary to sustain biological organisms, including sensitive species. Overdraft can also cause seawater to intrude into an aquifer causing degradation of the quality of the freshwater supply. All of these impacts are known to affect Santa Rosa and San Simeon Creeks and their groundwater aquifers.

<sup>4</sup> See, for example, analyses associated with the Commission's findings for the 1998 LCP North Coast Area Plan Update and for the 2001 San Luis Obispo County LCP Periodic Review, in which the Commission analyzed the issues and the problems in depth, including identifying the need for additional studies and measures to assure protection of the Creeks.

<sup>5</sup> See, for example, A-3-SLO-01-122 (Cambria Pines Lodge Expansion); A-3-SLO-02-050 (Monaco); A-3-SLO-02-073 (Hudzinski); A-3-SLO-13-0213 (Kingston Bay Senior Living); and A-3-SLO-14-0044 (Fox SFD).

applicable LCP policies, and certainly is not an adequate water supply to also serve *new* development in addition to that. It has been well understood for many years that an additional water supply is required for Cambria to provide reliable water supply service to its existing users without significant environmental degradation, and the same necessarily holds true for new water service to support new users. Because the CCSD's sole source of water is the Creeks' underground aquifers, the water supply is also particularly vulnerable to annual and seasonal fluctuations in rainfall. Further, because of the nature and configuration of the aquifers (i.e., they are narrow, shallow, porous, and surrounded by bedrock with little capacity for water storage), even in times of abundant rain the maximum storage capacity of these aquifers is inherently limited, and is significantly reduced in dry months. Thus, unless and until a new water supply is secured, the sustainability and long-term security of Cambria's existing supply cannot be improved with increased rainfall and is particularly susceptible to even short-term periods of drought.

In order to address these issues, including the Commission's concerns, the CCSD enacted a moratorium on new water connections in 2001,<sup>6</sup> which was also ultimately reflected in the LCP via an LCP amendment (as discussed below). The CCSD exempted from this moratorium certain proposed development projects in Cambria that were then on CCSD's existing commitments list. These were projects that were in the "pipeline" so to speak, which, according to the LCP (as amended) were those projects that at the time of the moratorium: (1) had valid water allocations, generally in the form of an intent-to-serve (or "will serve") letter from the CCSD; and (2) the County had accepted the project's CDP application for processing. At that time, there were approximately 64 such "pipeline projects." Subsequently in 2007, the County submitted, and the Commission certified, an LCP amendment addressing water supply issues in Cambria, which included standards specific to new development proposed within Cambria to address the known lack of adequate water supply (LCP Amendment SLO-MAJ-1-06 Part 1). The purpose of the amendment was, in part, to recognize that CCSD moratorium and to strictly limit new development requiring new water service in Cambria until the CCSD secured new water sources. The Commission found that:

*...new development in Cambria cannot be accommodated consistent with the Coastal Act absent a new water supply and a comprehensive analysis of the coastal resource protection requirements of San Simeon and Santa Rosa creeks, the underlying groundwater, and other coastal resources. ...In short, adequate public water supplies are not currently available for new development in Cambria.*

And in 2008, the San Luis Obispo County Board of Supervisors adopted an "Alert Level III" for Cambria's water supply under the LCP's Resource Management System.<sup>7</sup> The LCP identifies an Alert Level III as the most severe constraint level, where the existing demand of the resource has

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<sup>6</sup> As part of the CCSD's Water Code 350 Emergency Declaration on November 15, 2001.

<sup>7</sup> The RMS is a component of the Land Use Plan (LUP) that provides one of the tools for identifying and addressing identified resource constraints and capacities (e.g., water supply and wastewater treatment capacities). The main purpose of the RMS is to provide the County and the general public with a systematic means of assessing resource constraints and capacities on a regular basis, including annual reassessments that allow the County to regularly update such assessments in relation to the best available information, and to identify measures to address such issues.

met or exceeded the available capacity. Cambria’s water supply currently remains designated within the LCP Resource Management System as Alert Level III.

In short, Cambria has a critically short water supply, where extractions to serve the community significantly adversely affect significant coastal resources, including Santa Rosa and San Simeon Creeks and associated sensitive riparian habitats. These impacts are explicitly prohibited by both CCSD’s SWRCB water license as well as the Commission’s CDP to the CCSD recognizing same. The moratorium (which remains in effect today) and the applicable LCP provisions based on it (that were submitted by the County and certified by the Commission in 2007) *only* allow new water service to the handful of then-proposed development projects that were pending before the County at the time of the moratorium that CCSD had already committed to providing water (i.e., “pipeline projects”), and only then subject to required offsets designed to reduce additional demand on already oversubscribed water supplies. This exception from the moratorium for these pipeline projects was not due to any finding that they would not lead to harm to the existing water supply from adding more water demand to the system, rather it was considered a matter of equity and fairness to honor CCSD commitments made at the time (with the possibility of attendant legal risk if such commitments were not recognized), provided they were strictly limited in the manner described above, and the Commission agreed to this scheme in the 2007 LCP amendment. There were originally some 64 of these grandfathered pipeline projects, but there are no more such pipeline projects remaining today.<sup>8</sup> As a result, currently the LCP effectively prohibits approval of new water service in Cambria, taking into account the actual facts and reality on the ground.<sup>9</sup> Further, the *ongoing* impacts to the Creeks are inconsistent with the terms and conditions of CCSD’s water extraction licenses from the SWRCB and their CDP from the Commission, and allowing new water service in that context cannot be allowed consistent with either.

In 2014 the CCSD declared a “Stage 3 Water Shortage Emergency”<sup>10</sup> and acknowledged it did not and does not have adequate water supply to support Cambria’s *existing* water demand (see **Exhibit 7**). Existing wells at that time were lower than two feet above sea level and in the absence of a new water supply, the CCSD projected that sometime in 2014 “the community stands a real chance of literally running out of water, forcing Cambrians to shut businesses and possibly even leave homes.”<sup>11</sup> In response to this declared water emergency, San Luis Obispo

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<sup>8</sup> And even if there were, the approach for allowing them to proceed in the face of such water shortages was always considered interim. Some 18 years later, such issues of procedural fairness have diminished and much more is known about the extent of the water supply problem in Cambria. Thus, even if pipeline projects were to exist, such projects could not satisfy the requirements of CZLUO Section 23.04.430 requiring adequate water.

<sup>9</sup> The applicable LCP policy does potentially allow for new development requiring new water service that is *not* a pipeline project, but only if it is based on a water source that does not adversely impact Santa Rosa and San Simeon Creeks (NCAP Planning Area Standard 4; see **Exhibit 6**). Given that Cambria is served solely by the CCSD, and further given that the CCSD’s only water source comes from those two Creeks and leads to adverse impacts to them, development meeting such criteria is considered non-existent at this time. Certainly, at least in this case, the project in question cannot be found consistent with this LCP policy allowance since approval is premised on water service being provided by the CCSD.

<sup>10</sup> The Stage 3 Water Shortage Emergency was declared by the CCSD Board of Directors pursuant to Water Code Section 353, which allows governing bodies to adopt regulations and restrictions on water deliveries to conserve water for the greatest public benefit.

<sup>11</sup> See “*Cambria’s Emergency Water Supply Project: Questions and Answers*,” CCSD. November 3, 2014.

County granted the CCSD an Emergency CDP (see **Exhibit 8**) in June 2014 for a desalination plant meant to provide a temporary emergency water supply, despite Commission staff's articulated concerns at the time (and since) regarding the coastal resource impacts associated with such a project, including on environmentally sensitive habitat area (ESHA) (including where project components would be sited) and sensitive species. In fact, the CCSD had previously applied for a CDP from the Commission for test wells to assess the viability of a such desalination plant adjacent to Santa Rosa Creek, but the Commission denied that application due to its unmitigated and adverse coastal resource impacts. Nevertheless, the project was within the County's jurisdiction and the County issued the Emergency CDP based on the CCSD's assessment of Cambria's critically low water supply at that time. The project intended to treat a blend of salt, fresh and treated wastewater that would be stored in an effluent pond and injected back into the aquifer after several different treatment processes, including reverse osmosis. The project approved under the Emergency CDP was supposed to operate only during emergency conditions and only to provide water for existing development. The CCSD is currently facing litigation where petitioners claim that the CCSD operated the facility in non-emergency situations. The facility, however, is no longer operational anyway, in part due to a cease-and-desist order issued by the Regional Water Quality Control Board (RWQCB) in 2017, noting over 162 violations associated with the operation, including unpermitted and uncontrolled discharge into the groundwater system.

The CCSD has submitted a follow-up regular CDP application to the County (appealable to the Commission) designed to make the emergency operation a permanent and larger water supply project to be used for all purposes, including to serve new development requiring new water sources, but that application has not yet been filed as complete. The project will need to meet the requirements of numerous agencies, including the RWQCB, the California Department of Fish and Wildlife, the USFWS, the U.S. Army Corps of Engineers, and the National Marine Fisheries Service. All of these agencies, as well as Commission staff, have raised concerns regarding the likely environmental resource impacts from the proposed water supply project and its likely non-conformity with various elements of the LCP. There is currently no established timeline for when the CCSD might complete its CDP application, when the County might take action on it, and then when potential appeals of a County decision might be made to the Commission. Thus, it is not clear when, or even if, a facility such as is currently proposed may eventually come online, and it is not appropriate to countenance it in relation to whether such water source (if ultimately approved) could provide for new water connections to serve development, particularly the current proposal, in an LCP-consistent manner.

Thus, the CCSD continues to pursue at least that project to bolster water supplies in Cambria, but it is not clear when or if that project will be approved and/or come online, and thus the same water supply issues that have affected Cambria for decades (as reflected in the discussion above) apply today. Even water supply to *existing* development is problematic in relation to the substantive standards of applicable LCP provisions, without even considering new development. In fact, as stated succinctly by the Commission in 2007 as part of its approval of LCP Amendment SLO-MAJ-1-06 Part 1, and still pertinent today: "adequate public water supplies are not currently available for new development in Cambria." And the LCP has been amended in the past to recognize same, and to prohibit development (other than pipeline projects, of which no more exist today) that requires new water service absent the CCSD/community finding a new

sustainable water source and supply beyond the Creeks (LCP Amendment SLO-MAJ-1-06 Part 1).

### **CCSD Continues to Provide Intent-to-Serve Letters Despite Exhaustion of Pipeline Project List**

Notwithstanding these clear points about the LCP, the CCSD has continued to offer to provide new water services for proposed new development that is not part of the original “pipeline projects” list, as it did here, and the County has on occasion approved development based on CCSD “will serve” letters to that effect, as it did here. There are significant LCP interpretation and coastal resource concerns with the County’s approach. The CCSD has justified the issuance of intent-to-serve letters in three main ways. First, the CCSD asserts that it has simply made additional water commitments, notwithstanding the moratorium and the applicable LCP provisions, and estimates that there are some 32 proposed development projects currently pending that would represent new service to which it would provide intent-to-serve letters (including A-3-SLO-19-0033 (Peoples’ Self-Help Housing Affordable Apartments), for which the Commission recently found substantial issue on appeal, and A-3-SLO-19-0199 (Hadian SFD), for which the Commission found substantial issue and denied the project in November 2019). The CCSD indicates that this number can be increased at any time through court order, settlement agreement, or resolution by the CCSD’s Board of Directors (Board). However, none of these new commitments are “pipeline projects” that are recognized by the LCP, nor does such a posture evaluate whether such commitments are actually LCP consistent.

Second, the CCSD also states that it will provide service and new connections to undeveloped vacant parcels that have purchased an “active service transfer” whereby a vacant “receiver” parcel purchases an existing water meter from a “sender” property, as is the case here.<sup>12</sup> Although the active water meter transfer transaction may include the demolition of an existing structure and permanent retirement of the “sender” property, thus in theory offsetting the new connection of the “receiver” site, the sender property may sometimes be served by multiple water meters and sells an “extra” water meter without actually reducing water consumption at the “sender” site, as is the case here. Although the CCSD cannot currently confirm the exact number of vacant “receiver” parcels on its active water meter transfer list, the CCSD estimates approximately 12 parcels are currently on the list, and it further indicates that the number may increase at any time if additional water meter transfers are approved by the Board. The LCP does not account for nor condone such meter transfers as a method for ensuring adequate water supply, and in fact the Planning Area Standard 4(A) is based on allowing water service to continue for existing pre-moratorium customers, but not to create new customers through a type of “meter market exchange.”

And finally, the CCSD in the early 1990s determined that it would supply new water service to affordable housing projects at a rate of six such units per year, and that the units would be carried over from year to year if not brought online. In 2013 the CCSD capped the number of affordable units at 89, of which 33 were to be allotted to the People’s Self-Help Housing Affordable Apartments project that the Commission in September 2019 found raised a substantial issue of LCP conformance on appeal (A-3-SLO-19-0033). None of these allocations consider the impact of the new units on the CCSD’s limited water supply, nor the impact of additional withdrawals

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<sup>12</sup> See Section 8.04.100 of the CCSD Municipal Code. The CCSD Municipal Code is not part of the LCP.

from San Simeon and Santa Rosa Creeks. In fact, the allocation scheme described above predates both the CSD moratorium and corresponding LCP amendment discussed above. Again, although the LCP does encourage the provision of affordable housing, it does *not* provide a means for new water service past the pipeline projects' list unless and until a new water source comes online that can serve new development without adverse impacts to water supply. Currently, the CCSD indicates that it has active applications for 32 additional new affordable housing units (not counting the 33 units proposed under de novo application number A-3-SLO-19-0033).

In sum, the CCSD indicates that it would be willing to provide new water service for over 130 projects, none of which are on the pipeline list contemplated in the LCP, and none of which can be provided water service consistent with the LCP, the SWRCB water licenses, and the Commission's CDP, given the current facts and reality on the ground with respect to regional water supply. In addition, the CCSD further indicates that it has the authority to increase the number of such projects it would serve at any time and at its discretion based on its Municipal Code (which is not part of the LCP). All of this despite no support for same in the LCP, or in past LCP or CDP actions of the Commission or other substantial evidence that such commitments are in fact LCP consistent. While this is problematic, the County, not the CCSD, implements the LCP, and the CCSD's current unfounded positions would not in and of themselves lead to LCP inconsistencies. However, because the County has stated that such intent-to-serve letters by the CCSD are sufficient to determine that there is adequate water to serve new development, notwithstanding LCP provisions to the contrary that are specific to Cambria's water supply, the CCSD's posture with respect to water supply issues (by way of the County's reliance on the CCSD's representations in approving development under the LCP) raises serious issues regarding LCP water resource and sensitive habitat protections.

### **CCSD's Retrofit Program**

Pursuant to LCP Policy NCAP Planning Area Standard 4(B), if new development requires new water service that leads to an increase in water use, which is only allowed for pipeline projects, then such pipeline projects are required to "offset such increase through the retrofit of existing water fixtures within the Cambria Community Service District's service area, or through other verifiable actions to reduce existing water use in the service area (e.g. the replacement of irrigated landscaping with xeriscaping)." In practice, such offsets have occurred through CCSD's retrofit program. Specifically, prior to issuing an intent-to-serve letter, CCSD requires the proposed development to participate in its retrofit program in an attempt to offset the proposed water use. The program is designed to replace older water fixtures in existing homes with newer more efficient fixtures in order to reduce water consumption (e.g., such fixtures may include showerheads, toilets, laundry machines, irrigation systems, dishwashers, etc.). Proposed development may either install their own verified retrofits or purchase "retrofit points" that have been "banked" by the CCSD.

The CCSD indicates that such retrofit points are accumulated in three main ways, all of which are required and specified in Section 4.20.020 of the CCSD Municipal Code. First, whenever there is a residential sale in Cambria the buyer is required to retrofit the existing house, which is known as "Retrofit upon Resale." Second, whenever there is a remodel that includes plumbing fixtures, the property owner is required to retrofit the house. Third, whenever there is a change in use of a commercial structure, the owner or new tenant must retrofit the commercial structure. In these three situations, CCSD staff inspects the structures before the retrofits have been installed

and then 60 days after the initial inspection to confirm installation of retrofits. The identified water savings are calculated and “banked” as retrofit points. Per the CCSD, each point is intended to represent the saving of 1.47 gallons of water per day.

Much of the community of Cambria has already been retrofitted with efficient fixtures, and there are limited options available for additional retrofits. As a result, the CCSD indicates that most required water use offsets are accomplished through the purchase of retrofit points, which have already been banked from retrofits that were already required to be installed, which the CCSD indicates cost \$50 per point. The CCSD maintains a “Retrofit Points Equivalency Table” that explains the number of points a particular project needs to purchase, which is updated by the CCSD Board annually. For single-family homes, the number of points needed is determined based on the number of bathrooms and the square-footage of the project’s parcel. For this project, the CCSD determined that the three-bathroom house on a 7,780-square-foot parcel needs 155 retrofit points, which equates to 228 gallons per day. The CCSD indicates that the Applicant satisfied the retrofit requirements solely through the purchase of banked “Retrofit upon Resale” points.

There are a variety of problems with the CCSD’s retrofit program that suggest that, at best, it is unclear if it actually accomplishes what the LCP requires, namely an actual physical reduction in use of water that is equivalent to the amount of water that would be used by the pipeline project being allowed (bracketing for the moment that there are no more pipeline projects, and thus Planning Area Standard 4(B) is inapplicable to this project). First, the actual retrofits that are turned into points by the CCSD are required by CCSD ordinance and would occur regardless of any point banking. In fact, when the ordinance was adopted these retrofits were not intended to be “pre-allocated mitigation” that can be “banked” for some future impact (i.e., as mitigation banks are typically structured); rather they are independently required by regulation because of the issues the community had and still has with water supply adequacy with respect to new development projects. To require them once for this purpose, and then to allow *others* to rely on them for additional offsets would appear to be a form of “double-dipping” on the benefits of the mitigation required in each case of offset. All of the water offsets for this project were from the purchase of banked retrofit points that were required under the CCSD’s code for other projects warranting water use reduction efforts at some prior time. To actually offset proposed new water use, any offsetting *reductions* must be derived from the project itself and applied independently of prior actions and requirements designed to reduce water use for other purposes and projects. Further, the CCSD indicates that it does not even have a database of the existing retrofit points and does not know how many points are in its “bank.” In fact, there appears to be little to connect the purchase of retrofit points, were that even to be appropriate as an offset tool, to actual water use reduction, meaning any real reduction or even “no-net increase” of water usage based on purchase of offset credits may simply be illusory.

In addition, the CCSD indicates that it does not re-inspect the installed retrofits after the initial 60-day calculation inspection. Thus, property owners could inadvertently remove the retrofits (e.g., by replacing a showerhead, removing an aerator, or installing non-drip irrigation) and the water use reduction would not necessarily actually be realized. According to the CCSD’s last inventory of its retrofit bank in January 2014, over 70% of the banked retrofits were accomplished through showerhead and aerator replacements, which are the also the easiest and most common retrofits to remove. For this project, 125 of the 155 retrofit points (or just over

80%) purchased for this project were accumulated through showerhead and aerator replacements. In addition, once retrofit points are purchased or retrofits are installed, the CCSD does not require any further water offsets regardless of future water consumption. In other words, if a proposed project is built and actually uses more water than originally estimated, the project is not required to offset the additional water use and the project would then lead to an overall increase in Cambria's water use (assuming that the original retrofits installed or points purchased led to an actual reduction in water consumption in the first instance, which is questionable). Because the CCSD does not have an accounting of its retrofit points, including from which retrofit they were generated, it is also possible for the same structure to be retrofitted more than once, and to be deemed to have reduced the same amount of water use over and over again, and to generate additional retrofit points, even if only one water use reduction episode is possible. The CCSD also does not have information regarding actual ongoing water use of retrofitted properties to determine whether the calculated water savings has led to an actual reduction in water use. The CCSD also does not reduce allocated water entitlements for retrofitted structures to ensure that actual water consumption is decreased. Once the retrofits are calculated and banked, the points are available for purchase regardless of actual water savings.

Moreover, the LCP requires "written confirmation from the CCSD that any in-lieu fees collected from the applicant have been used to implement projects that have reduced existing water use within the service area in an amount equal or greater to the anticipated water use of the project." However, as explained above, the retrofit points available for purchase are banked from retrofits that are already required and have already been installed by CCSD customers at their own expense. The in-lieu fees paid by project Applicants to purchase retrofit points are not specifically reserved to implement water savings projects as required by the LCP, but such fees are instead deposited into the CCSD's "Water Operating Department" fund. In any event, neither the County nor the Applicant have demonstrated that any in-lieu fees paid by the Applicants for the purchase of retrofit points have been used by the CCSD to implement water projects that reduce existing water use within the service area.

Thus, the retrofit program suffers from a series of issues that appear to indicate that it does not actually serve to offset water use in the manner required by the LCP. Per the language of LCP Policy NCAP Planning Area Standard 4(B), the CCSD's retrofit program is not a *verifiable* action that actually reduces water use in the service area for the reasons discussed above. In addition and just as important, the LCP only allows the use of offsets for projects on the pipeline projects' list, and there are no such projects remaining in existence, and thus its use for LCP conformance is not even applicable to the current project or to new proposed development requiring new water service within Cambria generally.

### **Applicable LCP Provisions**

The San Luis Obispo LCP is divided geographically into four areas,<sup>13</sup> each with its own LCP area plan. The LCP also includes an LUP, titled the Coastal Zone Framework, and Implementation Plan, titled the Coastal Zone Land Use Ordinance (CZLUO), which are applicable throughout all LCP four areas. The subject property is located within the area governed by the North Coast Area Plan (NCAP). The NCAP includes an extensive policy framework meant to protect the area's rich coastal resources, including through policies that

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<sup>13</sup> The County's four LCP areas are: North Coast, Estero, San Luis Bay, and South County.



protect groundwater and associated riparian areas, require an adequate water supply to serve new development, limit growth to areas with adequate public services, and direct development to existing developed areas best able to accommodate it. The NCAP acknowledges that Cambria has a severely limited water supply that has long been recognized as inadequate to serve new development.<sup>14</sup> The NCAP provides more detailed policies and provisions applicable to potential development in Cambria that are in addition to the more general LUP and IP provisions that apply to this project, and that take precedence over these more general provisions when they provide more detail and/or there are any questions of internal LCP consistency.

Specifically, CZLUO Section 23.04.430 requires the County to find that “adequate” public services exist prior to approving any new development in San Luis Obispo County in general (see **Exhibit 6** for this and other referenced and applicable LCP policies and provisions). The Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood “adequate” public services in relation to water to mean that there exists a sustainable water supply that is not leading to adverse coastal resource impacts that has the capacity to accommodate the development being proposed.<sup>15</sup> As described above, such adequate water supply does not exist in Cambria to serve even *existing* development, and thus *new* development requiring provision of new water service necessarily cannot be found consistent with this LCP policy with respect to water in Cambria.

At the same time, the NCAP *does* allow for some limited new development to be accommodated in Cambria notwithstanding Section 23.04.430 limitations, but *only* where such new development is one of the aforementioned pipeline projects, and *only* where such pipeline projects offset their water use. Specifically, NCAP Planning Area Standard 4(A) states:

*New development not using CCSD connections or water service commitments existing as of November 15, 2001 (including those recognized as “pipeline projects” by the Coastal Commission on December 12, 2002 in coastal development permits A-3-SLO-02-050 and A-3-SLO-02-073), shall assure no adverse impacts to Santa Rosa and San Simeon Creeks.*

This policy was explicitly added to the LCP by the Commission through suggested modifications (that were accepted by the County) for the above-referenced 2007 LCP amendment to track the CCSD moratorium and pipeline projects, and to recognize that there is not an adequate water supply available to provide new water service in Cambria. The policy was proposed and accepted as part of the LCP based on the understanding that for a project proponent who is *not* an existing CCSD water-using customer (i.e., using then-existing CCSD connections) or is not pursuing a pipeline project (i.e., having a CCSD water service commitment for a CDP application accepted by the County) as of November 15, 2001 (i.e., the date of the moratorium), then the project may *only* be approved as having adequate water service where no adverse impacts are occurring to Santa Rosa and San Simeon Creeks. On that latter point, the Commission was clear in adopting a policy that did *not* stand for a premise that an individual project could assure “no adverse impacts” to the Creeks solely via offsets specific to its own

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<sup>14</sup> Including as identified and specified in the terms and conditions applicable to both the SWRCB water licenses and the Commission’s 1977 CDP for water extractions.

<sup>15</sup> See, for example, A-3-SLO-13-0213 (Kingston Bay Senior Living) and A-3-SLO-14-0044 (Fox SFD).

water use. Rather, the Commission's intent was to only allow for new water connections to serve new development when water withdrawals to serve the community generally were shown to no longer have adverse impacts to the Creeks.<sup>16</sup> In other words, pipeline projects that offset their water use (via offset requirements of NCAP Planning Area Standard 4(B)) were allowed under the LCP without necessarily needing to meet the standard of no impacts to the Creeks, but any other proposed projects are not allowed unless there are no adverse impacts to the Creeks. Given that there are existing significant adverse impacts to the Creeks from existing water extractions to provide water service to serve even *existing* Cambria development, NCAP Planning Area Standard 4(A) only allows for water service to new development in Cambria (absent some new water source other than Santa Rosa and San Simeon Creeks) if it is to serve a pipeline project. As detailed above, no more pipeline projects exist in Cambria. As a result, new development requiring provision of new water service in Cambria cannot be found consistent the LCP because no new adequate water supply has been identified, and Santa Rosa and San Simeon Creeks remain oversubscribed to their detriment.

In addition, even if a project were to qualify as a pipeline project, the LCP contains no provisions exempting such pipeline projects from satisfying the requirements of CZLUO Section 23.04.430. Although the Commission and the County have in certain cases allowed "pipeline projects" to proceed as long as they verified their water demand offsets (which was initially required as a condition of approval and was later codified in the LCP as a development standard), such an approach was always considered interim and such projects were allowed as a matter of procedural fairness (with potential attendant legal risks if such commitments were not recognized). This type of approach, when allowed, was always considered interim, including until more information regarding the effect water withdrawals were having on coastal stream and related resources was better understood. In other words, it was acknowledged that there was a water supply problem, and a subset of no-net increase projects would be allowed in the short term, until more information about the depth of the water supply problem was known. Some 18 years later, such issues of procedural fairness have diminished as much more is known about the extent of the water supply problem in Cambria. Thus, even if pipeline projects were to exist, such projects could not satisfy the requirements of CZLUO Section 23.04.430 requiring adequate water and therefore would not be allowed under a current understanding of the LCP.

Overall, these LCP provisions are meant to implement applicable Coastal Act policies that require new development to be served by adequate public services (Section 30250(a)), and in a manner that protects groundwater and creek resources (Sections 30231) and other coastal resources (Section 30250(a)) (see **Exhibit 6**). The LCP's CZLUO and the NCAP mirror these Coastal Act requirements and applies them to the specific water resource context in Cambria. In short, there is not adequate public water in Cambria that can be allotted to new water service in a manner that protects groundwater, creek, and other coastal resources., The LCP provisions appropriately recognize that and strictly limit the provision of new water service in Cambria to pipeline projects that offset their water use, absent a change in the circumstances regarding

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<sup>16</sup> In the 2008 LCP NCAP Update, the Commission focused on the water constraints in Cambria generally, stating the Commission's direction was that "new development in Cambria not be approved without a more serious effort to address the water supply constraints, including the provision of adequate storage and delivery. This also included recommending that the in-stream flows and riparian habitat requirements of the creeks be fully evaluated, and that the County and community complete a water management strategy with recommendations incorporated into the LCP."

adequacy of public water service in Cambria. Given that no such pipeline projects remain, the LCP simply does not allow for approval of any new development in Cambria that requires new water service from the Santa Rosa and San Simeon Creeks at this time considering the facts and reality on the ground in regards to regional water supply.

### **Appeal Contentions**

The appeal contends that the County-approved project is inconsistent with these aforementioned LCP groundwater resources and water supply policies. Specifically, the appeal states that Cambria's water supply is severely inadequate to serve even existing development and because Cambria's sole sources of water are already overdrafted and extracted at levels that have been found to impact sensitive habitats associated with Santa Rosa and San Simeon Creeks, the proposed project is inconsistent with the LCP. Furthermore, the appeal contends that the retrofits applied by the County are inadequate to offset the project's future water demands, and that the project will lead to increased water use and further adverse impacts to the Creeks. See the complete appeal documents in **Exhibit 5**.

### **Analysis**

The County found the project consistent with the LCP because the project secured an intent-to-serve letter from the CCSD and paid retrofit credits in accordance with the CCSD's retrofit program. Because the project participated in the retrofit program, the County determined that the project would not increase water use and therefore would not have an impact on Santa Rosa and San Simeon Creeks.

As explained above, CZLUO Section 23.04.430 states that a "permit for new development that requires water or disposal of sewage *shall not be approved unless the applicable approval body determines that there is adequate water.*" In other words, a lack of adequate water is grounds for denial and the LCP requires the County to make a finding that there is adequate water to serve the development. Although the NCAP also includes additional standards for development within Cambria, the requirements of CZLUO Section 23.04.430 are broadly applicable to all development (and the more specific NCAP standards are not inconsistent with CZLUO Section 23.04.430). Thus the County must find that there is adequate water to serve any proposed development prior to approval.

### *Intent-to-Serve Letters*

As a threshold matter, the CCSD's intent-to-serve letter is not substantial evidence to determine whether adequate water exists to serve the development. The LCP requires the County to independently determine that adequate water exists. The County's reliance on the CCSD's intent-to-serve letter is insufficient and the County failed to make an actual finding that the project has adequate water as required by the LCP. The County's approval included no evidence to demonstrate that the water supply in Cambria has substantially improved since the time the CCSD declared a water emergency and placed a moratorium on new development in 2001, as reflected in the LCP. Without additional evidence supporting the County's mere reliance on the CCSD's intent-to-serve letter as demonstrating that adequate water exists to serve the

development,<sup>17</sup> the approval raises a substantial issue of conformance with regard to whether there is adequate water to serve the development.

Additionally, as explained above, the CCSD has stated that it would potentially provide an additional over 130 intent-to-serve letters (or more, at their discretion) for new water service in Cambria to support other new development there. The CCSD provides intent-to-serve letters based upon its Municipal Code and Board resolutions, which are *not* part of the LCP and have *not* been approved by the County or the Commission (and thus the CCSD does not necessarily take into account LCP concerns such as adequacy of water supply as described in this report when providing an intent-to-serve letter pursuant to its legal authorities). The CCSD does not make LCP consistency findings prior to issuing such letters. Rather, the CCSD is a water purveyor that sells water, and its will-serve letters are not determinative of LCP compliance, in part due to the reasons identified above regarding the apparent flaws and oversights in relation to ensuring commitment of water service is actually done in a manner that ensures the protection of the regional water supply in relation to Santa Rosa and San Simeon Creeks. Rather such letters just indicate that the CCSD is willing to provide water service to a particular proposed development consistent with the CCSD's regulations, which are not part of the LCP. The County's use of a water intent-to-serve letter as proof of LCP consistency regarding the adequacy of water supplies is not appropriate for the reasons discussed above, and does not qualify as substantial evidence in this case of demonstrating CZLUO Section 23.04.430 consistency.

#### *Water Meter Transfer*

Even though the LCP states that new connections in Cambria are prohibited until an adequate public water supply that does not impact the Creeks is secured, the County's findings state that because a water meter transfer was completed, the project would not result in new water demand. The CCSD considers the "sender site" to be in active service since 2001 and the water transfer agreement (see **Exhibit 10**) requires the sender site to be permanently retired.

The sender site in this case is 1633 Main Street, which is currently developed with a commercial restaurant. The existing restaurant remains in active service and, according to the CCSD, consistently uses all of the commercial water allocated to the property. Despite the CCSD water transfer agreement the County's approval did not require the commercial use at 1633 Main Street to cease and the lot is not required to be retired from all development. Rather, the "meter" that was purchased for this project was an "extra" residential water unit. In 2001 the property at 1663 Main Street had the rights to one commercial water unit and one residential water unit. The property owner retained, and continues to utilize, the commercial water unit allocation and sold the residential water unit to the property at 5752 Moonstone Beach Drive. Neither the County nor the CCSD has been able to confirm whether a residential use ever existed at 1663 Main Street (*i.e.*, whether 1633 Main Street ever used the residential meter prior to sale to 5752 Moonstone Beach Drive), whether actual water use at this site was reduced in 2001 or anytime thereafter, or whether any water connections were removed from the property. Although the

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<sup>17</sup> As discussed above, the Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood "adequate" public services in relation to water for purposes of CZLUO Section 23.04.430 to mean that there exists a sustainable water supply that is not leading to adverse coastal resource impacts and that has capacity to accommodate the development being proposed.

property at 1663 Main Street will no longer be able to utilize a residential water unit allocation in the future, all available records indicate that a residential use never existed at the property. In other words, it does not appear that the “water meter transfer” (from 1633 Main Street to 5752 Moonstone Beach Drive) led to an actual reduction in water use within Cambria as suggested by the County and instead was merely the purchase of a paper water allocation.

To be clear, the LCP does not allow or condone any type of water meter exchange in order to allow for new water connections in a manner which could be deemed LCP consistent (*i.e.*, assures adequacy of water and wastewater services). The LCP only allows for a limited number of new connections for pipeline projects, of which there are none remaining today. The current project is therefore inconsistent with the LCP because it is not a pipeline project. However, this project is also particularly problematic because the water meter transfer that was completed did not lead to an actual reduction in water use and will lead to an increase in the overall number of water connections in Cambria.

#### *Adequacy of Water*

With respect to whether adequate water exists, as evidenced above, Cambria’s water supply is limited and it has been difficult to sustainably support even existing demand for decades. Neither the CCSD nor the County has provided evidence to suggest that as a factual matter the water supply in Cambria has changed from the conditions at the time the development moratorium was put into place. And the Commission has consistently found that the existing water supply is inadequate to serve even *existing* development, and further has expressly found that there is an inadequate water supply to serve new development in the context of the adoption of LCP Amendment SLO-MAJ-1-06 Part 1, which incorporated the development moratorium into the LCP, stating that “*adequate public water supplies are not currently available for new development in Cambria.*” The County did not provide nor develop any independent information for the approved project that suggests that the existing water supply for Cambria is adequate (*i.e.*, that there exists a sustainable water supply that is not leading to adverse coastal resource impacts to Santa Rosa and San Simeon Creeks), or that there is available water to provide new water service for new development in Cambria.

The evidence that is available suggests quite the opposite, including the CCSD’s water moratorium enacted in 2001, the County’s declaration of an Alert Level III (*i.e.*, the most severe level in which existing demand for the resource has met or exceeded the available capacity) for Cambria’s water supply under the LCP’s Resource Management System in 2008, and most recently the CCSD’s declared Stage 3 Water Shortage Emergency in 2014. Due to the Creek system’s limited capacity for water storage and seasonal droughts, such water shortages are the norm and are not unique to periods of extended drought. The CCSD’s own well level reports (see **Exhibit 9**) demonstrate that severe water shortages, such as the one declared in 2014, have occurred repeatedly over the past three decades and well levels have dropped to such emergency levels as experienced in 2014 an additional 18 times. Additionally, as a condition of the 1977 CDP approval of the CCSD’s water system, the Commission required the CCSD to discontinue its use of wells along Santa Rosa Creek, except in emergencies when water cannot be safely removed from San Simeon Creek. According to the CCSD’s records, since 1988 water withdrawals from Santa Rosa Creek have occurred every year except one, demonstrating that the community is consistently in an emergency situation and the water supply is inadequate to serve even existing users. Further, there is a lack of evidence to suggest that even *existing*

withdrawals can be found consistent with the terms and conditions of the SWRCB water licenses and the Commission's companion water extraction CDP, including regarding maintaining water levels in the basins to sustain stream flows to protect fish and riparian habitat. In fact, just the opposite appears true here. The County has not supported its approval with evidence that adequate water exists for the project, beyond mere reliance on the CCSD's intent-to-serve letter and a requirement for retrofitting offsets without proven efficacy, which itself does not address any of the aforementioned issues and thus represents a substantial issue with respect to LCP water supply consistency.

*Impacts to Santa Rosa and San Simeon Creeks*

In addition to the requirements of CZLUO Section 23.04.430, as detailed further above, NCAP Planning Area Standard 4(A) requires new development in Cambria that is not a pipeline project (such as the project proposed here) to show that there are no adverse impacts to Santa Rosa and San Simeon Creeks from water supply activities. Protection of these important coastal resources is further supported in numerous LCP policies, such as NCAP Planning Area Standard 4, Coastal Watersheds Policies 1 and 2, and ESHA Policies 2, 7, and 20 (see **Exhibit 6**). NCAP Planning Area Standard 4A requires that development "assure no adverse impacts to Santa Rosa and San Simeon Creeks." Coastal Watersheds Policy 1 provides that the "long-term integrity of groundwater basins within the coastal zone shall be protected." In addition, Coastal Watershed Policy 2 states that "[g]roundwater levels and surface flows shall be maintained to ensure the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organisms, and for the protection of human health." ESHA Policy 7 adds: "Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored." Finally, ESHA Policy 20 provides: "Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological system and ecological function of coastal streams shall be protected and preserved." CZLUO Section 23.04.430, in conjunction with these LCP coastal resource policies, demonstrates the strong emphasis that the LCP places on ensuring that instream flows are adequate to protect groundwater aquifers, wetlands, and sensitive riparian habitats – including, importantly, the Santa Rosa and San Simeon Creeks.

In the time since the LCP NCAP update, additional studies have been completed regarding the health of these ecosystems (Santa Rosa and San Simeon Creeks). One such study was released in January 2014: "*San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study)*," prepared by Stillwater Sciences for the Coastal San Luis Resource Conservation District.<sup>18</sup> In the SLO Instream Flow Study, scientists found that both of the Creeks' instream flows in the summer of 2013 were inadequate to meet even the bare minimum necessary to maintain aquatic habitat systems, despite the fact that the terms and conditions of the 1977 CDP and the SWRCB water licenses only allow water extractions if the CCSD simultaneously ensures there is adequate stream flow in order to protect fisheries and other riparian habitat resources. The study states that Environmental Water Demand (EWD) is only the "minimum values to maintain aquatic systems, and should not be interpreted as 'enough' water to support long-term, sustainable steelhead populations or the complex ecosystems in which they live." The study found that the observed instream water flows were inadequate to meet the Creeks' estimated

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<sup>18</sup> See Appendix A.

required EWDs to support steelhead, i.e. the indicator species. To illustrate, in lower Santa Rosa Creek, the estimated spring EWD was 3.0 cubic feet per second (“cfs”); however, the actual observed EWD was only 1.62 cfs. Lower Santa Rosa Creek’s estimated summer EWD was 0.75 cfs, but the observed EWD was 0.0 cfs (meaning wetted with no water velocity). The San Simeon Creek’s estimated EWD for the spring was 1.5 cfs; however, only 0.99 cfs was observed. Thus, the instream flows in both Creeks were well below the minimum necessary to maintain aquatic systems, and these habitat impacts are explicitly prohibited by both CCSD’s SWRCB water licenses as well as the Commission’s CDP to the CCSD recognizing same.

The study expressed particular concern for Santa Rosa Creek, which had no flow in the summer of 2013, rendering the creek incapable of providing steelhead habitat during that time. The study further found that the Santa Rosa Creek lagoon conditions were “worsened by low stream flows resulting from excessive groundwater pumping and diversions...” The SLO Instream Flow Study further explained that “[r]educed freshwater inflows result in water temperatures and dissolved oxygen levels in the lagoon, particularly at the bottom, that can frequently exceed lethal limits for steelhead in the summer and the fall,” and that “entire sections of the lower lagoon dried up, reducing the area of suitable steelhead rearing habitat.” When Santa Rosa Creek lagoon inflows ceased entirely in summer 2013, steelhead (adults and presumably juveniles) were observed trapped in a pool that decreased dramatically in extent and water quality.”<sup>19</sup> Similar conclusions regarding the adverse impacts of existing groundwater extractions were also reached in California Department of Fish and Wildlife’s February 2012 “*Santa Rosa Creek Watershed Management Plan*” and National Marine Fisheries Service December 2013 “*South-Central California Steelhead Recovery Plan*” (see **Appendix A**)

In sum, the most recent scientific studies independently demonstrate that the CCSD’s existing water extractions to serve even existing development have adverse impacts to the Creeks and there is inadequate water to sustain the Creeks’ sensitive riparian habitats. Thus available evidence would suggest that, until a new water supply is secured or existing water extractions are dramatically decreased, *any and all* new water service to new development in Cambria will be unable to demonstrate that the proposed development will not adversely impact the Creeks. Thus this project raises a substantial issue of LCP conformity with NCAP Planning Area Standard 4(A), Coastal Watersheds Policies 1 and 2, and ESHA Policies 2, 7, and 20.

#### *Retrofits and Water Offsets*

If new development is able to demonstrate an adequate water supply and no adverse impacts to the Creeks, the NCAP Planning Area Standard 4(B) also requires new development that leads to a water use increase to “offset such increase through the retrofit of existing water fixtures within the CCSD’s service area, or through other verifiable actions to reduce existing water use in the service area (e.g. the replacement of irrigated landscaping with xeriscaping).” This policy also requires “written confirmation from the CCSD that any in-lieu fees collected from the applicant have been used to implement projects that have reduced existing water use within the service area in an amount equal or greater to the anticipated water use of the project.”

As explained above, the CCSD does not verify that installed retrofits are maintained over time (thus ensuring a permanent reduction in water usage as would be expected of a retrofit in

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<sup>19</sup> See Appendix A *SLO Instream Flow Study* at pp. 17-19, 30-31.

theory/on paper), nor does the CCSD confirm that installed retrofits lead to actual water use reductions in retrofitted structures (in part, because, as discussed above the CCSD does not adequately account for “bank” retrofit/offset credits, so any purported benefit of a retrofit may be “double-dipped” by a project proponent purchasing an offset credit; and also, in part, because, as discussed above, the CCSD does not track retrofitted development over time to ensure that actual water usage does not exceed proposed water usage, even accounting for reductions due to retrofits). Although the project here participated in the CCSD’s retrofit program, the program itself appears inadequate to ensure that the proposed water increase would *in fact* be adequately offset as required by the LCP to ensure reduction in existing water use in the service area.

Additionally, the project offset its water through the purchase of retrofit credits. Despite the requirement that any in-lieu fees are used to implement water savings projects that reduce existing water use within the service area in an amount equal or greater to the anticipated water use of the project, the CCSD has not provided written confirmation that it has implemented such projects, and all retrofit credit fees are placed into the CCSD’s Water Operations Department fund (according to the CCSD Fiscal Year 2018/2019 Budget). Thus, even if there were adequate water (which there is not, for the reasons discussed above), and even if the County had demonstrated that there are no adverse impacts to the Creeks from water supply activities (which it did not, as discussed above) the project also raises a substantial issue with regard to whether the water increase associated with the project would be adequately offset as required by the LCP and whether the retrofit credit fees collected were used to implement water savings projects.

In short, adequate public water supplies are not currently available for new development in Cambria and therefore any new development that requires new water service, including the current project, raises a substantial issue of conformance with the LCP.

### **3. The Five “Substantial Issue” Factors**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a de novo CDP for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance. Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

In this case, these five factors, considered together, strongly support a conclusion that the County’s approval of this project raises a substantial issue of LCP conformance. Most importantly for making the substantial issue determination in this case, regarding the first factor, the County found the development consistent with applicable LCP water supply and groundwater resources policies based almost entirely on the CCSD issuing an intent-to-serve letter merely requiring retrofit offsets. The County also stated that the water meter exchange that was completed for the project would not lead to an increase in water use, without providing any



evidence the water use at the sender site has been reduced or that the water meter exchange represents anything other than simply a “paper” water use reduction. The County provided no independent analysis regarding the adequacy of Cambria’s water supply generally (with the term “adequacy” to be understood, as discussed above, to mean that there exists a sustainable water supply that is not leading to adverse coastal resource impacts and that has capacity to accommodate the development being proposed), in consideration of the CCSD intent-to-serve letter or the water meter exchange, even though the LCP requires the County to make such a finding. And the overwhelming evidence is to the contrary, namely that there is *not* an adequate water supply available to serve this development (including CCSD’s water moratorium enacted in 2001, the corresponding LCP amendment reflecting this moratorium, the County’s declaration of an Alert Level III for Cambria’s water supply under the LCP’s Resource Management System in 2008, and most recently CCSD’s declared Stage 3 Water Shortage Emergency in 2014, all of which are still currently in effect; the findings of the SLO Instream Flow Study; the terms and conditions of the SWRCB water licenses and the Commission’s 1977 CDP; Commission LCP and CDP actions consistent with the identified evidentiary findings; etc.).

Further, the LCP provides a series of standards for allowing such new water service, and the County did not provide evidence to suggest that the project meets *any* of these standards. Specifically, the approved project is not a pipeline project so it is not allowed new water service under that criteria,<sup>20</sup> and, even if it were allowable under one or the other of those criteria, the project’s water use was not offset appropriately, as would also be required (NCAP Planning Area Standard 4(B)). The County’s approval does not provide any evidence to address these points in a manner that demonstrates that the project on appeal was approved in a manner consistent with the LCP. On the contrary, the available facts and evidence suggest that the LCP requires project denial. Thus, the County has not provided adequate factual or legal support for its decision to allow a new water service connection in an area of known water shortage, where even existing water extractions for existing development are leading to significant adverse coastal resource impacts.

Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of substantial issue because, although the project itself is fairly limited in scope (a 2,944-square foot single-family dwelling with an attached 524-square-foot garage on a 7,780 square-foot parcel), approval of the project at all would result in a new water connection in an area of known water shortage, further exacerbating already significant adverse coastal resource impacts.<sup>21</sup> In short, under these circumstances approval of *any* new development, regardless of extent and scope, which would require water from the Santa Rosa and/or San Simeon Creeks should be deemed significant. Regarding the third factor, the proposed project is

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<sup>20</sup> Per NCAP Planning Area Standard 4(A), water supply activities currently adversely impact Santa Rosa and San Simeon Creeks, thus the project is not allowed because it cannot demonstrate lack of such adverse impact.

<sup>21</sup> As discussed above, the CCSD enacted a water moratorium in 2001, the County declared an Alert Level III for Cambria’s water supply under the LCP’s Resource Management System in 2008, and the CCSD declared a Stage 3 Water Shortage Emergency in 2014. Further, the base SWRCB water licenses and the base Commission CDP for water extractions share similar terms and conditions that limit allowable extractions to that which can be accomplished while at the same time maintaining adequate in-stream flows to protect Creek resources, which is not even currently the case with existing water withdrawals. Thus, the significance of these actions with respect to the water shortage in Cambria also informs the significance of the extent and scope of the proposed development, which would necessarily use water from the water system.

located in an area where the depletion of groundwater adversely affects significant coastal resources, including Santa Rosa and San Simeon Creeks and associated sensitive riparian habitats. Per the LCP, Santa Rosa and San Simeon Creeks are, in and of themselves, ESHA. Furthermore, the significance of these Creeks as coastal resources is also based on the fact that these are the only sources of water availability for development within the Cambria community generally. This factor supports a finding of substantial issue. Regarding the fourth factor, because the project raises such coastal resource protection concerns, including interpreting the LCP to allow for new water connections in an area with a severe water shortage as LCP consistent merely by reliance on a CSD will-serve letter and retrofit offsets, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP, particularly considering the significant lack of factual or legal basis justifying the County's decision, as discussed above for the first factor. Moreover, this precedential interpretation issue is also particularly concerning as the CCSD has stated that it would provide service to over 130 (or more) projects beyond this project, which would implicate the exact same LCP water supply issues as identified for this project for a large number of projects within the County, all proposed to rely on water from the Santa Rosa and San Simeon Creeks.

Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to statewide concerns regarding water resources, the importance of groundwater resources in San Luis Obispo County, and growth and development issues in Cambria and the County more broadly, considering the severe regional water supply shortage. In short, the County-approved project does not adequately address LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue.

#### **4. Substantial Issue Determination Conclusion**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, which determines whether the Commission will assert jurisdiction over a de novo CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance, including when evaluated in light of the five factors discussed above.

For the reasons stated above, the Commission finds that the County's approval of the project raises a substantial LCP conformance issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and therefore the Commission takes de novo jurisdiction over the CDP application for the proposed project.

### **G. COASTAL DEVELOPMENT PERMIT DETERMINATION**

The standard of review for this CDP determination is the San Luis Obispo County certified LCP. All Substantial Issue Determination findings above are incorporated herein by reference.

#### **1. Project is Inconsistent with LCP Groundwater Resources and Water Supply Policies**

As described in the "Substantial Issue Determination" section above, the Commission finds the project inconsistent with the San Luis Obispo County certified LCP for the same reason that the Commission determined the project raised a substantial issue: namely, the LCP requires that

adequate public services be available to serve new development and that this type of development assure no adverse impacts to Santa Rosa and San Simeon Creeks.

CZLUO Section 23.04.430 prohibits approval of new development unless it has been demonstrated that an adequate water supply is available to serve the proposed development. The Commission, in previous appeals, has consistently interpreted Section 23.04.430's water supply adequacy requirement as meaning that the community has a water supply capable of serving proposed new development in a manner that is consistent with the LCP's protection of coastal resources and coastal priority uses.<sup>22</sup> Thus, Section 23.04.430 must be read in conjunction with other relevant LCP policies pertaining to the protection of such coastal resources as sensitive riparian habitats, groundwater aquifers, wetlands, and lagoons – and in particular here, Santa Rosa and San Simeon Creeks. In addition, NCAP Planning Area Standard 4 specifically requires that development assure no adverse impacts to Santa Rosa and San Simeon Creeks. As discussed above, it is not possible to make this finding for the proposed project based on the facts and evidence in the record. See **Exhibit 6** for all LCP provisions cited in this section.

The community of Cambria does not have an adequate water supply available to serve its existing users, much less a new water connection proposed in the current project.<sup>23</sup> Given the lack of water to serve even existing needs, it is apparent that there is also not adequate water to supply new development such as this project in a manner that is consistent with the protection of sensitive riparian habitats, groundwater aquifers, wetlands, and lagoons – including Santa Rosa and San Simeon Creeks. Best available information suggests that even existing water extractions have adverse impacts to Santa Rosa and San Simeon creeks.<sup>24</sup> In short, Cambria does not have adequate water to serve new development based on applicable LCP provisions as informed by the facts and reality on the ground.

Moreover, the LCP only allows for new water connections for a limited number of pipeline projects, of which there are none remaining. This project is not a pipeline project and thus cannot be found consistent with the LCP policy prohibiting new connections unless there is an adequate water supply. The LCP does not allow or condone any type of water meter exchange such as the one proposed here in order to allow for new water service connections, nor does the County's approval demonstrate that such a scheme is LCP consistent on the facts. Additionally, because there is no evidence to suggest that a residential use ever actually existed at the "sender" site, the water meter exchange proposed for this project has not been demonstrated on the facts to lead to an actual reduction in water use, but instead may lead to an increase in overall water connections in Cambria. All new development must demonstrate that there is an adequate water supply to serve the project and all new development in Cambria must demonstrate that the project will have no adverse impacts to Santa Rosa and San Simeon Creeks. As explained above, any new

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<sup>22</sup> See, for example, A-3-SLO-01-122 (Cambria Pines Lodge Expansion); A-3-SLO-02-073 (Hudzinski SFD); A-3-SLO-03-050 (Monaco SFD); A-3-SLO-02-073 (Hudzinski); A-3-SLO-04-048 (Berge CCOC).

<sup>23</sup> See, for example, CCSD's water moratorium enacted in 2001, the County's declaration of an Alert Level III for Cambria's water supply under the LCP's Resource Management System in 2008, CCSD's declared Stage 3 Water Shortage Emergency in 2014, San Simeon Creek Well Levels 1988-Current, etc.).

<sup>24</sup> See, for example, *SLO Instream Flow Study*; *Santa Rosa Creek Watershed Management Plan*; *South-Central California Steelhead Recovery Plan*.

development, including the proposed project, cannot meet these LCP requirements based on the facts and evidence in the record.

Unless and until Cambria solves its water supply problem and there is adequate water to serve existing and new development in a manner that does not adversely impact coastal resources, new water service to serve new development is simply not LCP compliant. As such, denial in this case is required by the LCP.

## **2. CDP Determination Conclusion**

As discussed above, the proposed project is inconsistent with the LCP's provisions that require new development to ensure that adequate water is available to serve the project and that the project will not have adverse impacts to environmentally sensitive habitat areas, including Santa Rosa and San Simeon Creeks. Thus the project must be denied. Typically, the proposed project would need to be evaluated for consistency with other relevant LCP policies and standards, such as those related to visual resources, archaeology and cultural resources, hydrology and water quality, parking and traffic, and land use and zoning. However, because the project is being denied due to substantial inconsistency with the LCP's groundwater resources and water supply policies, these issues are not evaluated in this de novo review.

## **3. Takings**

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

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

Although the judiciary would be the final arbiter on constitutional takings issues, the Coastal Act, as well as the State and Federal Constitutions, enable the Commission to assess whether its action might constitute a taking so that the Commission may take steps to avoid this result. 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.

The remainder of this section evaluates whether, for purposes of compliance with Section 30010, denial of the proposed project 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, and denial of the project is due to the factual circumstance of lack of adequate water, rather than a regulatory prohibition.

### **General Principles of Takings Law**

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>25</sup> 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 taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 (“*Pennsylvania Coal*”)) [stating “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”)]. Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (*Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). The first category consists of those cases in which government authorizes a physical occupation of property (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426). The second category consists of those cases whereby government “merely” regulates the use of property and considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole (*Yee*, 503 U.S. at 522-523). Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (*Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). Here, because the current development proposal does not involve physical occupation of the applicant’s property by the Commission, the Commission’s actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015. In *Lucas*, the Court found that regulation that denied all

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<sup>25</sup> 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).

economically viable use of property was a taking without a “case specific” inquiry into the public interest involved. (*Id.* at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” (*Id.* at 1017-1018 (*emphasis* in original); *Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 (regulatory takings occur only under “extreme circumstances.”<sup>26</sup>).

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. (*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.)

### **The Commission’s Denial of Proposed Project Would Not Result in a Regulatory Taking**

The Commission’s denial of the proposed project would not result in a regulatory taking because any such claim is premature and denial of the project is due to the factual circumstance of lack of adequate water, rather than a regulatory prohibition. As analyzed above, application of CZLUO Section 23.04.430 requires denial of the proposed development on the grounds that Cambria lacks sufficient water supply and NCAP Planning Area Standard 4(A) further requires denial as existing water extractions have known adverse impacts to San Simeon and Santa Rosa Creeks. Thus, it could be potentially argued that the regulation results in an unconstitutional taking of the Applicant’s private property. However, based on the law and facts analyzed below, it is unlikely

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<sup>26</sup> 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).

that such a temporary denial of development due to the present factual circumstances (which are subject to change, and thus would allow for project approval) would constitute an unconstitutional taking in this case.

At this time, application of CZLUO Section 23.04.430 and NCAP Planning Area Standard 4(A) has the effect of a moratorium on new development in Cambria that requires new water service. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory takings. (*Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302 (*Tahoe-Sierra*)). In the *Tahoe-Sierra* case, the Court reasoned that, “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” (*Id.* at 332.) The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy. (*Id.* at 337.) “In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.” (*Id.* at 337-38.) Here, CZLUO Section 23.04.430 and NCAP Planning Area Standard 4(A) have the effect of a temporary prohibition on economic use, and as soon as the water supply is adequate the prohibition would be deemed lifted. Moreover, Section 23.04.430 and NCAP Planning Area Standard 4(A) are essential components of a comprehensive LCP planning tool that ensures that growth in Cambria is efficient and sustainable, not exceeding the community’s resource carrying capacity. It also ensures the protection of significant resources, such as sensitive riparian habitat, and is intended to protect groundwater aquifers from adverse impacts such as seawater intrusion and subsidence. Thus, Section 23.04.430 and NCAP Planning Area Standard 4(A) as “interim development controls” ensure that successful development does not run afoul of takings concerns, as recognized by *Tahoe-Sierra*.

This position is also consistent with the California Court of Appeal for the Fourth District reasoning in *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4th 1068 (“*Pratt*”). In *Pratt*, the plaintiff argued that the Coastal Commission’s decision to deny a CDP based on lack of water, due to the requirements of the San Luis Obispo County LCP in that case as well, was an unconstitutional taking. The Court of Appeal upheld the Commission’s denial of the CDP and found that it was not an unconstitutional taking. It stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) the setting of priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, “Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.” (*Id.*) The court also found that an “intent-to-serve letter” from a community water supplier did not change the result because there is no rule that the water company’s determination is definitive. (*Id.*) “It is undisputed,” the court continued, “that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft.” (*Id.*) The court further reasoned that the plaintiff-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water. As in *Pratt*, in this case it is the lack of water in Cambria, not the regulation, that has delayed the Applicant’s ability to develop the site.

In context of the legal authorities discussed above, any claim of a taking now would be premature at this time because the Commission’s denial of the proposed development is not a

“final and authoritative determination” of the effect of CZLUO Section 23.04.430, NCAP Planning Area Standard 4(A), and other relevant LCP provisions on the proposed development, as the proposed development *could* be found consistent with the LCP if the factual circumstances change so as to support the necessary findings. As recognized in *Tahoe-Sierra*, the Applicant’s property is not rendered valueless due to the temporary, *de-facto* moratorium on new development requiring new water service due to lack of adequate water, and such moratoria as interim development controls are valid planning tools. Moreover, as recognized in *Pratt*, it is the factual circumstance of lack of adequate water that warrants denial of the proposed development of this time, rather than the regulatory nature of the applicable LCP provisions. In other words, if and when the factual circumstances change such that a finding can be made that adequate water supply exists for the proposed development, then the project would be able to be found consistent with CZLUO Section 23.04.430, NCAP Planning Area Standard 4(A), and other relevant LCP provisions.

In sum, it is unlikely that the Commission’s decision to deny a CDP for the proposed development, on the grounds that the proposed development is inconsistent with CZLUO Section 23.04.430 and NCAP Planning Area Standard 4(A), considering the facts and evidence in the record, would result in an unconstitutional taking. Although the regulation’s effect is a *de facto* moratorium on new development requiring new water service in Cambria at this time, this effect of the regulation is temporary in nature and caused by the factual circumstance of insufficient water resources in Cambria.

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

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

*CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects. [Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*

*Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication....(b) This division does not apply to any of the following activities:...(5) Projects which a public agency rejects or disapproves.*

*CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved. (a) CEQA does not apply to projects which a public agency rejects or disapproves.*

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

Pursuant to CEQA Guidelines (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 these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project was approved as proposed. Accordingly, the Commission’s denial of the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS<sup>27</sup>**

- “*Water Use Efficiency Plan*,” Cambria Community Services District. February 21, 2013.
- “*Groundwater Management Plan*,” Cambria Community Services District. November 19, 2015.
- “*Issuance of Water Right Licenses 13916 and 13917*,” State Water Resources Control Board. March 14, 2019.
- “*Cambria’s Emergency Water Supply Project: Questions and Answers*,” Cambria Community Services District. November 3, 2014.
- “*San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study)*,” January 2014.
- “*Santa Rosa Creek Watershed Management Plan*,” California Department of Fish and Wildlife. February 2012.
- “*South-Central California Steelhead Recovery Plan*,” National Marine Fisheries Service. December 2013.

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

- San Luis Obispo County Planning and Building Department
- Cambria Community Services District
- State Water Resources Control Board

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<sup>27</sup> These documents are available for review in the Commission’s Central Coast District office.