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Action Deadline: None
Staff: Brian O'Neill - SC
Substantial Issue: 10/18/2019
Staff Report: 1/24/2020
Hearing Date: 2/12/2020

APPEAL STAFF REPORT: DE NOVO HEARING

Appeal Number: A-3-SLO-19-0180

Applicant: Shear Development Co., LLC

Project Location: 282 Mar Vista Drive, 294 Mar Vista Drive, and 284 Highland Drive in the unincorporated Los Osos area of San Luis Obispo County just inland of Morro Bay (APNs 074-025-019, -017, -023)

Project Description: Construction of three single-family residences on three vacant parcels: (a 2,476-square-foot two-story residence on a 21,579-square-foot parcel; a 2,766-square-foot one-story residence on a 23,032-square-foot parcel; and a 3,008-square-foot two-story residence on a 22,296-square-foot parcel).

Staff Recommendation: Denial

SUMMARY OF STAFF RECOMMENDATION

The Applicant proposes to construct three single-family residences and related site improvements on three undeveloped lots in the Los Osos area of the County inland of Morro Bay, including authorizing connecting to the Los Osos community wastewater treatment plant system for wastewater disposal. On October 18, 2019, the Commission found that the County's approval of the project raised a substantial issue with numerous San Luis Obispo County Local Coastal Program (LCP) provisions. Specifically, the Commission found that the project was inconsistent with water supply and wastewater provisions, including those that require denial of

projects where adequate water and wastewater supply are not available, and that the project was inconsistent with the LCP's environmentally sensitive habitat (ESHA) provisions, which only allow uses dependent on the resource within such habitat areas, and only when such allowable uses are sited and designed in a manner that does not significantly disrupt habitat values. The Commission found that the entire Los Osos community (including the project site) likely constitutes ESHA due to much of the area being critical habitat for the federally endangered Morro shoulderband snail. Prior to the October 2019 Substantial Issue determination, the Applicant exercised its one-time right to postpone the de novo hearing.

With respect to public services, LCP Public Services Policy 1 requires all development in the County to be served by adequate water and wastewater services, and requires denial of a proposed project should such services not be available. Los Osos is a community that has historically suffered from an inadequate water source (including in terms of water supply from an overdrafted groundwater basin and impacted water quality due to nitrate contamination) and an inadequate wastewater collection and treatment system (including leaking individual septic systems). The Commission recognized all of these constraints when it approved the Los Osos Wastewater Project (LOWWP) in 2010 via CDP A-3-SLO-09-055/069. That CDP approved a new modern community wastewater treatment facility for Los Osos. However, due to potential growth inducement impacts (including impacts to water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified), and the need to better proactively and comprehensively plan for growth and mitigate impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP)), the Commission imposed Special Condition 6 as a condition of approval of CDP A-3-SLO-09-055/069.

Special Condition 6 prohibits wastewater service to undeveloped properties within the service area, such as those that are the subject of this appeal, unless and until the LCP is amended to identify appropriate and sustainable buildout limits. Although the County is working on the Los Osos Community Plan to this end, at this time the LCP has not been amended to establish sustainable buildout in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect. Due to this prohibition, there is no wastewater service available to serve the approved project and the LCP therefore requires denial of the proposed development. Moreover, the County has not yet developed an approved groundwater basin management plan to monitor water supply and reduce extractions accordingly, which is a critical aspect of the LCP update that is required before the sewer connection prohibition of Special Condition 6 can be lifted. Thus, there is currently no evidence to support a determination that adequate water or wastewater services exist to serve the development as required by the LCP, and the County is in fact prohibited from providing sewer service to this property by CDP A-3-SLO-09-055/069.

Additionally, all of Los Osos is located atop an ancient dune system and the entire community has in the past been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail. This project is located on the periphery of a more developed area. The project would lead to the permanent loss of over a half acre of potential ESHA, and would have impacts to any remaining ESHA as well as temporary construction related impacts. The County is currently in the midst of finalizing a community-wide sensitive species protection and mitigation program, in the form of an HCP, to

identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impacts of that development. However, although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, which is envisioned as part of the Los Osos Community Plan (which is in the process of being developed). Thus, and absent site-specific details, as contemplated by the LCP to be established through the HCP, there is insufficient information in the record to conclude that this proposed project can be found consistent with the LCP's ESHA provisions, including a lack of evidence to support a determination that the project will not have adverse impacts to ESHA.

Staff therefore recommends that the Commission deny a CDP for the proposed project. The motion is found on page 4 below.

TABLE OF CONTENTS

I. MOTION AND RESOLUTION	4
II. FINDINGS AND DECLARATIONS	5
A. PROJECT LOCATION	5
B. PROJECT DESCRIPTION AND HISTORY	5
C. COASTAL DEVELOPMENT PERMIT DETERMINATION	6
1. Public Services	6
2. Environmentally Sensitive Habitat (ESHA)	12

APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – Proposed Project Plans

Exhibit 4 – County Informational Brochure “Vacant Lots in Los Osos – FAQs”

Exhibit 5 – Commission Staff Letters Regarding Special Condition 6

Exhibit 6 – Applicable LCP Provisions

CORRESPONDENCE

EX PARTE COMMUNICATIONS

I. MOTION AND RESOLUTION

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

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-SLO-19-0180 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-19-0180 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 three vacant parcels on the southern edge of the unincorporated community of Los Osos (at 282 Mar Vista Drive, 294 Mar Vista Drive, and 284 Highland Drive). Los Osos is an unincorporated coastal community of about 15,000 residents that is located in central San Luis Obispo County at the south end of Morro Bay and roughly due west of the City of San Luis Obispo. The Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California's coastal zone. Los Osos is generally located atop an ancient dune system formed by centuries of wind-blown sand coming from the southern end of Morro Bay. As a result, the terrain consists primarily of gently rolling hills and sandy soils. The sandy soils of Los Osos, its connection to Morro Bay, and its generally mild marine climate have combined to produce a unique coastal ecosystem that is home to a wide variety of uniquely adapted plant and animal species, some of which are found nowhere else in the world.

The project site consists of three noncontiguous undeveloped parcels. All three parcels are relatively flat with terracing along the perimeters. The lots are described as consisting of Baywood fine sandy soil with slopes ranging from 2 to 9 percent. The sites are covered primarily with nonnative grasses with coast live oak, Monterey cypress, and eucalyptus trees along the perimeters. The eastern portion of the lot at 295 Mar Vista includes a more heavily vegetated stormwater basin. The lot at 282 Mar Vista includes a volleyball court in the middle of the lot. The parcels are zoned residential single family, which allows for one residence per legal parcel.

See **Exhibit 1** for project location maps and **Exhibit 2** for photos of the project site.

B. PROJECT DESCRIPTION AND HISTORY

The Applicant proposes to construct three single-family residences and related site improvements on three undeveloped lots along Mar Vista and Highlands Drive on the edge of a more developed portion of Los Osos. The project includes a 2,476-square-foot, 23-foot-tall two-story residence on a 21,579-square-foot parcel at 294 Mar Vista Drive; a 2,766-square-foot, 19-foot-tall one-story residence on a 23,032-square-foot parcel at 282 Mar Vista Drive; and a 3,008-square-foot, 24-foot-tall two-story residence on a 22,296-square-foot parcel at 284 Highland Drive. The project also proposes to dispose the wastewater from each of the three residences through connections to the Los Osos community wastewater treatment plant system. See the proposed project plans in **Exhibit 3**.

The three lots currently proposed for development were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved physical development of four of the residential units on four other lots, but explicitly chose not to approve physical development of residential units on the remaining four vacant lots, three of which are the lots that are the subject of the current proposal. At that time the Commission found that there was too much uncertainty

regarding wastewater service in Los Osos, and that it was inappropriate to allow actual buildout of these lots (i.e., those subject to this appeal) unless and until a new community wastewater treatment system could be developed (which it has, the LOWWP) and these lots could be served by it (which they cannot by the terms and conditions applicable to the LOWWP, specifically Special Condition 6). The Commission at that time required that any physical development on the remaining four lots, three of which are the subject of the current proposal, would require future separate CDPs.

On December 15, 2017, the San Luis Obispo County Planning Department Hearing Officer denied the proposed project (CDP Application No. DRC2017-00029) based on LCP inconsistencies with respect to the protection of water quality and groundwater resources. The Applicant appealed the Planning Department's denial to the County's Board of Supervisors and on July 16, 2019 the Board ultimately approved a CDP for the proposed project by a vote of 3-2. The County's approval was subsequently appealed to the Commission. On October 18, 2019, the Commission found that the County's approval of the project raised a substantial issue with numerous San Luis Obispo County Local Coastal Program (LCP) provisions related to water supply, wastewater, and ESHA. Prior to the October 2019 Substantial Issue determination, the Applicant exercised its one-time right to postpone the De Novo hearing.

C. COASTAL DEVELOPMENT PERMIT DETERMINATION

The standard of review for this CDP determination is the San Luis Obispo County certified LCP. For the reasons discussed further below, the Commission determines that the proposed project must be denied.

1. Public Services

Applicable LCP Provisions and Los Osos Public Services Background

The San Luis Obispo County LCP is divided geographically into four areas,¹ each with its own LCP area plan. The LCP also includes a Land Use Plan titled the "Coastal Zone Framework," and an Implementation Plan titled the "Coastal Zone Land Use Ordinance" (CZLUO), which are both applicable throughout all four LCP areas. The subject properties are located within the area governed by the Estero Area Plan (EAP).

The Coastal Zone Framework lays out the main objectives of the LCP. With respect to Public Services, Public Policy 1 states that the amount, location, and rate of development must be kept within the sustainable capacity of resources, public services, and public facilities. CZLUO Section 23.04.430 carries out this policy, requiring the County to find that adequate public services exist prior to approving any new development in San Luis Obispo County (see **Exhibit 6** for this and other referenced and applicable LCP 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 and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts.

¹ The County's four areas are: North Coast, Estero, San Luis Bay, and South County.

The EAP recognizes that Los Osos has long suffered from inadequate public services, particularly related to water supply and wastewater capacity. The EAP states that “[p]erhaps no factor is of greater concern today than the future availability of potable water for Los Osos” and that “Los Osos is confronted with two basic problems. Groundwater extraction levels are rapidly increasing while groundwater quality is showing indications of possible deterioration.” Because Los Osos wastewater was traditionally handled through septic disposal within the same groundwater basin that supplies the Community’s potable water, the EAP states the two issues are “closely interrelated” due to a combination of highly permeable soils, high groundwater tables, and extensive community development that led to inadequately treated septic discharges into ground and surface water.

The EAP acknowledges the community’s need to resolve the interrelated issues of water and wastewater, particularly in relation to the important coastal resources impacted by these issues, including the groundwater basin, Morro Bay Estuary, and other sensitive habitats found throughout Los Osos. The EAP identified the need to create community-wide programs to deal with water and wastewater service, but also recognized the need for any public services projects to identify the appropriate “extent and density of development and its impact on groundwater quantity and quality.”

Beginning in the early 1970’s, the Regional Water Quality Control Board (RWQCB) and other health agencies began to raise environmental health and safety concerns regarding the use of septic systems in Los Osos. The RWQCB took a series of steps to address these concerns, beginning with adopting an interim Basin Plan in 1971 that included a provision prohibiting septic system discharges in much of Los Osos after 1974. In 1983, the RWQCB subsequently determined that the situation was worsening, and adopted a wastewater discharge prohibition for a portion of the Los Osos area known as the Prohibition Zone. In 1988, the RWQCB also established a discharge moratorium that effectively halted all new construction and all major expansions of existing development until a solution to the septic tank pollution problem could be developed and implemented.

There were a series of attempts to address the identified ground and surface water pollution issues in Los Osos through construction and operation of a wastewater project. In 1990, the Coastal Commission approved an amendment to the Estero Area Plan that would have allowed a conventional wastewater collection and treatment plant on rural agricultural land off Turri Road, which was subsequently abandoned in favor of an alternative site at South Bay Boulevard and Pismo Avenue. A County-approved CDP for a wastewater treatment project at this site was appealed to the Coastal Commission, but ultimately no action was taken by the Commission in order to allow the community an opportunity to pursue potential alternative wastewater projects. In 1998 a local ballot measure formed the Los Osos Community Services District (LOCSD). The LOCSD pursued a new CDP for a conventional wastewater collection and treatment project for a plant in the middle of town at the Tri-W site along Los Osos Valley Road. The Commission approved an LCP amendment in 2002 to allow a wastewater treatment at that site. In 2004, the Commission, on appeal, approved the project with conditions. Project construction commenced at the Tri-W site in 2005, but a newly-elected LOCSD board suspended construction and the project was abandoned.

In 2006, wastewater authority for the Los Osos area was returned from the LOCSD to the County. The County embarked on an extensive alternatives evaluation to evaluate potential solutions to deal with the disposal of the wastewater for existing development. The County ultimately approved the Los Osos Wastewater Project (LOWWP), which provided for the construction and operation of a community sewer system, including a treatment plant on 30 acres located about one-half mile inland of Morro Bay, collection/disposal/reuse facilities, and all associated development and infrastructure. The County's approvals of CDPs for the LOWWP project were appealed to the Coastal Commission and, upon a finding of substantial issue, the Commission subsequently approved the project with a series of special conditions in 2010 (CDP A-3-SLO-09-055/069).²

Although the Commission recognized the immediate need for the LOWWP to resolve issues of groundwater contamination caused by the existing individual septic systems, the Commission also noted that the County had not done the planning necessary to determine the appropriate level of additional future development within Los Osos that could be accommodated while avoiding coastal resource impacts. As noted in the EAP and the Commission's approval of the LOWWP, the issues of water and wastewater are interrelated due to their impacts to the groundwater basin. Thus, a sustainable basin management program is critical to ensure that future development is limited to an environmentally sustainable level. Due to the potential growth inducement impacts of the LOWWP, including on a water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified, and on ESHA resources and the need to better proactively and comprehensively plan for growth and mitigate impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP)), the Commission approved the LOWWP subject to Special Condition 6. Per the Commission's findings:

*Special Condition 6 of this permit limits wastewater service to **undeveloped** properties within the service area unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits. This requirement builds on County conditions 86 and 92 requiring an HCP be prepared to address the potential for ESHA impacts as a result of community buildout. The HCP is intended to carry out LCP ESHA protection requirements and be effectively implemented before development of vacant land begins to occur and before providing service to undeveloped parcels. ...*

*Therefore, similar to the proposed project (i.e., via incorporated County condition 86), Special Condition 6 prohibits the provision of wastewater service to **undeveloped** properties within the service area unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats. [emphasis added]*

Thus, unless and until the EAP is amended to identify sustainable buildout limits, including in terms of water usage/supply and ESHA considerations, the LOWWP is *prohibited* from serving

² Due to the manner in which the County acted on the CDP for the LOWWP (an overall approval action followed by an amendment action to modify a portion of the project), there are two Coastal Commission permit numbers associated with the project.

undeveloped properties within Los Osos, including the three properties that are the subject of this appeal. At this time, although the County has made significant progress in developing a Los Osos Community Plan,³ the LCP has yet to be amended to establish sustainable buildout in Los Osos. Thus Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect.⁴

The County has previously recognized that wastewater service to undeveloped parcels is currently prohibited, including through informational brochures that are distributed to Los Osos homeowners (see **Exhibit 4**) and a prior denial of new sewer connections to undeveloped properties.⁵ Additionally, Commission staff has repeatedly informed the County and property owners of the prohibition (see **Exhibit 5**), including to explain that Special Condition 6 was intended to limit any expansion of wastewater service to facilitate increased growth and development in the community generally until appropriate sustainable buildout limits are identified, and thus Special Condition 6 must be interpreted broadly. The prohibition on new wastewater service therefore should not only be applied to clearly-applicable cases that involve new development on completely vacant parcels, but the prohibition must also apply to projects that include significant intensifications of use, significant expansions on already developed properties, or where the property owners previously purchased wastewater or water saving credits.⁶ (In other words, for purposes of addressing the fundamental concern underlying Special Condition 6 as well as Public Works Policy 1 and LCP Section 23.040.430 – that new development not be approved until adequate public services are identified for the community – there is no material difference between new development of a vacant parcel and significant intensification/expansion of an already-developed parcel.)

³ The County published a Draft Environmental Impact Report for the Community Plan on September 12, 2019 and intends to bring the plan forward for Board of Supervisor and Coastal Commission approval in early 2020.

⁴ The Coastal Commission has previously approved amendments to CDP A-3-SLO-09-055/069 to allow for expansions of the service area of the LOWWP in order to serve *already developed properties* so as to better protect coastal resources, such as in June 2016 to allow the Monarch Grove area to be added to the service area to avoid continued use of the area's failing wastewater treatment package plant. Such an amendment is consistent with the intent of the CDP and Special Condition 6 because the amendment provided for an immediate solution to the community's wastewater service issues with regard to *existing development* while not facilitating increased, growth-inducing development until the EAP is updated.

⁵ See County CDP Application DRC2015-00092 (Novy SFD), denied by the County Planning Department on September 2, 2016.

⁶ Los Osos residents have previously inquired whether properties that have secured wastewater or water saving credits (otherwise known as "Title 19 Retrofit Certificates") could be developed prior to the EAP update. In terms of wastewater credits, the RWQCB has indicated that any credits available from past actions were intended for properties that were already eligible to connect to the sewer. For example, if someone has a property that is eligible to connect to the community sewer system and wants to build prior to being hooked up to the sewer, then that person could utilize a credit to install a temporary septic system. However, as detailed above, only already-developed properties are eligible for sewer connections at this time and thus those properties would not need to utilize a previously-secured temporary septic credit at this time. In terms of water saving certificates, these certificates alone do not entitle development at this time. Although these water conservation certificates were previously issued to properties in the septic prohibition zone, the certificate does not guarantee the right to develop parcels upon completion of the sewer, but rather once the parcel is eligible to connect to the future sewer system. As described above, the key threshold before wastewater service can be provided to any undeveloped property is certification of an updated Los Osos portion of the Estero Area Plan by the Coastal Commission.

Analysis

The proposed project includes the construction of three new residences on three undeveloped parcels within Los Osos. The new residential structures would be served by the LOWWP, which is prohibited from serving undeveloped parcels due to Special Condition 6 of CDP A-3-SLO-09-055/069. As explained above, CZLUO Section 23.04.430 (**Exhibit 6**) 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 and sewage disposal capacity available to serve the proposed development.” In other words, the LCP requires a finding that there is adequate water availability and sewage disposal capacity to serve the development; the lack of either water availability or sewage disposal is grounds for denial of a project. Thus, in order to approve the project, the Commission must find that there is adequate water and sewage disposal capacity to serve any proposed development prior to approval.

With respect to sewage disposal, as explained above, Special Condition 6 of CDP A-3-SLO-09-055/069 prohibits the LOWWP from serving undeveloped properties, such as the three undeveloped properties at issue here, at this time. If the project were to connect to the LOWWP currently, the County would be in violation of CDP A-3-SLO-09-055/069 (specifically Special Condition 6) and subject to potential enforcement proceedings. Moreover, the RWQCB prohibits individual septic systems in this area due to the high likelihood of groundwater contamination, and thus the project is prohibited from installing septic systems as an alternative means for sewage disposal instead of connecting to the LOWWP. The project cannot legally connect to the LOWWP at this time or install septic systems. Thus, the project lacks wastewater service, and the LCP requires denial of the project at this time. In other words, until the EAP is updated in order to identify sustainable buildout limits in Los Osos and Special Condition 6’s prohibition on sewage service to undeveloped properties is lifted, the current project cannot be found consistent with the LCP, namely Public Policy 1 and CZLUO Section 23.04.430, and in fact the County is prohibited from providing such services to these properties by the Commission’s LOWWP CDP. Thus, there is not adequate sewage disposal capacity to serve the proposed project and the project must be denied at this time.

The Applicant claims Special Condition 6 of the Commission’s CDP approval for the Los Osos Wastewater Plant is not the standard of review for the project and the only valid standard is nonconformance with the LCP. However, the Applicant misconstrues the purpose for which staff analyzes the impact of Special Condition 6 on the project. As explained above, the project is inconsistent with relevant LCP provisions – namely Public Works Policy 1, which requires development to be served by adequate public services, and LCP Section 23.040.430, which requires denial of projects that do not have access to adequate public services. Special Condition 6 is relevant to this analysis as it relates to whether the project can be found consistent with Public Works Policy 1 and LCP Section 23.040.430. Because Special Condition 6 *prohibits* the County from providing wastewater service to undeveloped properties, such as the properties at issue here, and therefore the project is prohibited from connecting to the LOWWP and is also prohibited from installing septic as a means of wastewater disposal, *as a factual matter* the project does not have a legal means of disposing of its wastewater. Thus the project does not have adequate wastewater service and, according to LCP Section 23.040.430, must be denied.

The Applicant also suggests that because sewer laterals to the property were apparently installed prior to the approval of the LOWWP, development of residences on the subject properties were in some way accounted for in the approval of the LOWWP and connection to the sewer system must be allowed. However, in the Commission's 2004 approval of the subdivision that created the subject lots,⁷ the Commission specifically *rejected* the proposed future speculative physical development/buildout of these subdivided lots due to the uncertainty regarding any future community sewer system. The Commission at the time found that there was too much uncertainty regarding wastewater service in Los Osos, and that it was inappropriate to allow development of these lots (i.e., those subject to this application) unless and until a new community wastewater treatment system could be developed (which it has, the LOWWP) and these lots could be served by it (which they cannot by the terms and conditions applicable to the LOWWP). Nothing in the record of the Commission's LOWWP approval suggests that the subject lots, or any other undeveloped lots, would be exempt from Special Condition 6's prohibition on connections to undeveloped properties. The Commission therefore required any physical residential development of the subject lots to secure separate CDP approval, subject to applicable LCP requirements at the time of the future proposed development.

The prohibition reflected in Special Condition 6 was put in place to allow for the proper water, wastewater, and ESHA LCP planning to occur so that allowable and sustainable development and growth could be identified consistent with protection of coastal resources, including through an HCP, LCP amendment and the Los Osos Community Plan. Until then, the Commission was clear through its approval of CDP A-3-SLO-09-055/069 that only already existing development in the service area that needed wastewater service was allowed LOWWP service. The Commission rejects an argument that any "anticipatory" physical development in anticipation of buildout of the vacant, previously-subdivided lots (e.g., sidewalks in a subdivision, as the Applicant argues here) somehow negates the Commission's clear intent in this regard. These properties are simply not allowed LOWWP service due to Special Condition 6, and thus consistency cannot be found with Public Works Policy 1 or LCP Section 23.040.430 in regards to adequacy of public services.

Moreover, the Commission *did not approve* the installation of any sewer laterals onto the subject lots as the applicant asserts. In fact, Special Condition 2 of the Commission's approval of CDP A-3-SLO-09-055/069⁷ required that the applicant record a scenic easement over the undeveloped lots, which prohibited the installation of any "building, structure, or other improvements" on the properties. Any such sewer lateral development that may have taken place on the properties subsequent to approval of CDP A-3-SLO-09-055/069 was not permitted under the Commission's prior approval, and is not consistent with the terms of the recorded scenic easement that was required. And any related assertions that the Commission somehow intended to, or did, approve this project via its 2004 approval (which has since been abandoned), or somehow obligated a future Commission to approve it, or somehow contemplated serving this project through its 2010 CDP for the LOWWP, are simply inaccurate.

⁷ Again, these three lots were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved physical development/buildout of four residential units on four other lots, but explicitly chose *not* to approve physical development/buildout of the then-proposed four residential units on the remaining four vacant lots, three of which are the lots that are the subject of this current application.

Moreover, as reflected in the Commission’s approval of the LOWWP, including inclusion of Special Condition 6, the purpose of the limitation of Special Condition 6 with respect to new connections is clear, and the “anticipatory” water and sewer mains and laterals referenced by the Applicant (again, for which authorization to put said improvements in place is unclear at best) cannot be understood as rendering the parcels here “developed” for purposes of avoiding application of Special Condition 6. To the contrary, the whole purpose of Special Condition 6 was to allow for the proper buildout planning associated with Los Osos to be accomplished through an LCP amendment and an HCP. Such an LCP amendment will need to set specific standards for future sustainable and appropriate infill and other development in Los Osos in relation to not only fragile water supplies and wastewater services, but also their connection to sensitive species and other habitat protection, and including the ways in which same affect the adjacent Morro Bay estuary and its related groundwater and other resources. That planning is in progress, but not yet complete, and approval of this project at this time is thus premature considering this context.

With respect to adequate water, Los Osos’ entire water supply is extracted from a groundwater basin that has long suffered from overdraft conditions. Excessive groundwater pumping has led to seawater intrusion, water contamination, and adverse impacts to sensitive habitats. As explained above, one of the main reasons the Commission included Special Condition 6 in the LOWWP CDP was because the County had not completed a comprehensive analysis and did not have enough information to identify a sustainable level of growth in Los Osos that could be served by adequate water without depleting the groundwater basin and causing other adverse impacts to coastal resources. Although the County is working diligently on this front, and intends to include same within the ongoing Los Osos Community Plan efforts, to date the County has not completed that analysis and has not yet identified a sustainable buildout limit. Although the project proposes to implement water-saving retrofits, the County has not yet developed an approved basin management plan to monitor water supply and reduce extractions accordingly to ensure that such retrofits would actually be effective and subsequently that coastal resources are protected. Until such time as that basin management plan (or equivalent) is in place, which is a critical aspect of the Los Osos Community Plan update, there is currently a lack of evidence supporting a determination that adequate water exists to serve the development. Without additional evidence to determine whether there is adequate water to serve the development consistent with Public Policy 1 and CZLUO Section 23.04.430, the LCP requires that the project be denied until such time that a basin management plan (or equivalent) is developed to ensure there is adequate water to serve the proposed development.⁸

2. Environmentally Sensitive Habitat (ESHA)

Applicable LCP Provisions and ESHA Background

The LCP includes a robust policy framework to prevent adverse impacts to ESHA. ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. ESHA Policy 2 requires development in or near ESHA to “demonstrate that there will be no significant impact on sensitive habitats” and provide: “a) the

⁸ And again, 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 and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts. [Citations to past examples if you have them.]

maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures” as a condition of approval. Because significant ESHA resources are known to occur within the County’s urban areas, such as Los Osos, ESHA Policy 6 requires the County to create an off-site mitigation program in order to allow for development in urban areas that may not serve as long-term viable habitat in consideration of permanent protection of off-site ESHA. See **Exhibit 6** for all the ESHA provisions cited in this section.

With respect to wetlands and riparian areas, 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.” 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.

Los Osos is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California’s coastal zone. The Morro Bay watershed stretches inland to the foothills of the Santa Lucia Range, and a variety of coastal creeks and tributaries (including Los Osos, Warden, Chorro, and Morro Creeks) wend their way from the hills down through Los Osos and to Morro Bay, forming the area’s ESHA mosaic.

Most of the Los Osos built environment has been constructed on ancient dunes formed by centuries of wind-blown beach sand that was deposited along the south end of Morro Bay and, as a result, the terrain of Los Osos consists of gently rolling hills and sandy soils, often referred to as “Baywood fines.” The sandy soils and marine climate combine to produce a unique coastal ecosystem that is home to a wide array of plant and animal species, some of which are found nowhere else in the world. The dune, bluff, dune scrub, and chaparral communities that comprise this unique coastal ecosystem are all ESHA as designated in the LCP?. The EAP recognizes that areas underlain by these types of soils are “included in the Sensitive Resource Area combining designation and are also an Environmentally Sensitive Habitat.” Since nearly all the urban area of Los Osos is underlain by this same sandy soil that supports ESHA and/or ESHA seed bank, the rebuttable presumption is that all of the undeveloped land within this area, including remaining vacant parcels such as the parcels at issue here, is comprised of the same sandy soils constituting ESHA under the LCP. In fact, the entire community has in the past been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail.

Analysis

The proposed project includes the construction of three new residences on undeveloped parcels within Los Osos. Although the Applicant’s biologist visited the subject parcels, at which time no

Morro shoulderband snails were observed, no formal field surveys for the federally endangered Morro shoulderband snail were conducted at the project sites. The biological report for the projects noted that although Morro shoulderband snails were found on a parcel in the immediate vicinity of the project site, the report nonetheless concludes that snails were unlikely to be found on the subject parcels. However, the fact that no snails were observed during the biologist's site visit is not conclusive evidence that this sensitive species will not be present at a later date when the project is constructed.

As noted, above, all of Los Osos, including the project site, has been recognized by the Commission and the LCP as ESHA because it is underlain with sandy soil that supports ESHA or ESHA seed bank, in addition to providing potential habitat for sensitive species such as the Morro shoulderband snail. The LCP recognizes that any area that is underlain by "Baywood fines" soil is considered a Sensitive Resource Area and ESHA. The biological report that was completed for this project states that the subject properties include Baywood fines soils and thus the rebuttable presumption is that the entire project site constitutes ESHA.

The Applicant has not proposed any mitigation for the permanent loss of habitat that would be caused by the project. Ultimately, the project would include 24,742 square feet, or over a half-acre, of building and pavement coverage among the three parcels. The proposed project would likely therefore lead to the permanent loss of over a half acre of ESHA, and would also impact adjacent ESHA and have temporary construction-related impacts to ESHA.

ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. ESHA Policy 2 requires development in or near ESHA to demonstrate no significant impact to habitats and requires projects to include the maximum feasible mitigation measures and monitoring. The LCP requires that mitigation be included in the approval of any project located within ESHA. As also noted above, LCP ESHA Policy 6 states that mitigation for development within urban areas should be accomplished through a programmatic approach that includes off-site mitigation. See **Exhibit 6** for all the LCP provisions cited in this section.

As discussed in the "Public Services" section above, the County is currently in the midst of creating a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impact of that development. However, although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, as is envisioned to occur as part of the Los Osos Community Plan in process. Until such time as the HCP (or an equally protective alternative) is complete and the program is incorporated into the LCP via the Los Osos Community Plan, individual project-level mitigation may not adequately offset potential ESHA impacts as required. Thus, and absent site-specific details, as contemplated by the LCP to be established through the HCP, there is insufficient information in the record to conclude that this proposed project can be found consistent with the LCP's ESHA provisions, including a lack of evidence to support a determination that the project will not have adverse impacts to ESHA.

Additionally, Coastal Watersheds Policy 1 requires long-term integrity of groundwater basins to be protected and Coastal Watershed Policy 2 requires groundwater levels to be maintained to prevent adverse impacts to coastal waters, wetlands and streams. The project would be served by a water supply derived solely from groundwater basin extractions that are known to have caused adverse impacts to Morro Bay watersheds, wetlands, and associated habitats. Until such a time that the County develops a groundwater basin management plan (or functional equivalent), identifies a sustainable level of growth within the community, and incorporates that planning effort into the LCP, any additional development, including the three residences at issue here, may accelerate groundwater basin depletion and lead to adverse impacts to wetlands and Morro Bay watershed ESHA. Without additional evidence to show that the community can sustainably support increased residential development without impairing wetland and Morro Bay watershed ESHA, as contemplated by the LCP to be established through the HCP?, the approval cannot be found consistent with the LCP's Coastal Watersheds and ESHA provisions.

3. LCP Consistency Conclusion

As discussed above, the proposed project is inconsistent with the LCP's provisions that require new development to ensure that adequate water and wastewater capacity is available to serve the project. The project may also have adverse impacts to environmentally sensitive habitat areas, which have not been adequately identified nor evaluated for whether avoidance and/or mitigation is necessary. Thus the project must be denied at this time. Typically, the proposed project would need to be evaluated for consistency with other LCP policies and standards 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, water supply, and ESHA provisions, these issues are not evaluated in this de novo review.

4. Takings

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

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

Although the judiciary would be the final arbiter on constitutional takings issues, the Coastal Act, as well as the State and Federal Constitutions, enable the Commission to assess whether its

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

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

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."⁹ 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

⁹ 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).

applicant's property by the Commission, the Commission's actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved. (*Id.* at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" (*Id.* at 1017-1018 (*emphasis* in original); *Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 (regulatory takings occur only under "extreme circumstances."¹⁰).

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.)

Denial of the proposed project would not result in a regulatory taking

As analyzed above, application of CZLUO Section 23.04.430 requires denial of the proposed development at this time on the grounds that Los Osos lacks sufficient public services to serve

¹⁰ 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).

the project. Thus, it could be 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 that such a temporary denial of development on these facts would constitute an unconstitutional taking in this case.

At this time, application of CZLUO Section 23.04.430 (in further consideration of special condition 6 of the LOWWP CDP) has the effect of a moratorium on new development in Los Osos that requires water and wastewater 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, application of CZLUO Section 23.04.430 to the factual circumstances on the ground has the effect of a temporary prohibition on economic use due to the lack of evidence of an adequate water supply and wastewater service to serve the proposed development as required by Public Policy 1 and CZLUO Section 23.04.430, and as soon as the water supply and wastewater service is found to be adequate to serve new development as a factual matter, the prohibition would not apply. Moreover, CZLUO Section 23.04.430 is an essential component of a comprehensive LCP planning tool that ensures that growth in Los Osos is efficient and sustainable, and that it does not exceed the community's resource carrying capacity in terms of avoiding significant adverse impacts to coastal resources, including water supply and wastewater service. It also ensures the protection of other significant natural coastal resources, such as sensitive terrestrial, wetland, and riparian habitat, and is intended to protect groundwater aquifers from adverse impacts such as seawater intrusion and subsidence.

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 CZLUO Section 23.04.430(a) 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 insufficient water supply constitutes a taking; or (2) that 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 public services (water

availability and wastewater service) in Los Osos, not the regulation, that has temporarily delayed the Applicant's ability to develop the site. Finally, it is worth noting that the LCP policy which the court in *Pratt* held that, when applied, did not result in a taking is the same LCP policy which justifies denial of the proposed projects here (CZLUO Section 23.04.430). So an appellate court has already adjudged that temporary denial of a project on the basis that the project cannot demonstrate adequate water supply does not result in an unconstitutional taking of private property.

In sum, it is unlikely that the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with CZLUO Section 23.04.430, would result in an unconstitutional taking.¹¹ Although the regulation's effect is a *de facto* moratorium on new development at this time, this effect of the regulation is temporary in nature and caused by the factual circumstance of insufficient public services in Los Osos, rather than any prohibition on development inherent in the regulation itself.

D. 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

¹¹ Although, as discussed previously in this report, denial of the proposed development is also justifiable on the basis of inconsistency with the LCP ESHA policies, denial on this basis also does not result in an unconstitutional taking of private property. As explained previously, for purposes of a takings analysis, a final and authoritative determination does not occur unless the Applicant has first submitted a development plan that was rejected, and also sought a variance from regulatory requirements that was denied. On the one hand, a request for a variance from strict application of the LCP ESHA policies is moot at this time since the proposed development must be denied on the basis of inadequacy of public services per the LCP, as discussed above.

However, assuming that in the future factual circumstances change such that the proposed development *can* be found to be served by adequate public services as required by the LCP, though denial of the proposed development is presently justified on the basis of inconsistency with LCP ESHA policies, this is so in part because the Applicant and County did not rebut the presumption that the project sites are ESHA by properly considering whether the sites constitute ESHA beyond a single survey of shoulderband snail presence. Per EAP Environmental and Cultural Resources Policy III.E., any area underlain by Baywood fine soils has the ability to support sensitive habitat and is considered ESHA and according to the biological report that was completed for this project, all three lots consist of Baywood fine soils. Thus, once the properties are properly identified as ESHA and evaluated consistent with LCP requirements, as contemplated to be updated through the LCP via establishment of the HCP, it may turn out that the project is not inconsistent with LCP ESHA provisions at all. Even if it is determined that the proposed project would be inconsistent with ESHA provisions, the project may be able to be revised and approved in a manner which avoids LCP ESHA inconsistencies. Or, if such inconsistency is unavoidable, the Commission may approve the minimum amount of development necessary to avoid an unconstitutional taking of private property, despite the LCP ESHA inconsistency. Given these various potential outcomes, all of which would avoid the outcome of an unconstitutional taking of private property, it would be premature at this time to assert that denial of the proposed development on the basis of LCP ESHA provisions results in a taking.

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

- *Morro Shoulderband Snail Habitat Assessment and Protocol Survey Report for the Shear Development MUP DRC2017-00029, Lots 1, 3, 5, and 7 of Tract 2161, Los Osos, San Luis Obispo County, California.* Ecological Assets Management, LLC. March 14, 2019.

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- SAN LUIS OBISPO COUNTY PLANNING DEPARTMENT
- OASIS ASSOCIATES, INC.