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# W14d

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Staff: Brian O'Neill - SC  
Staff Report: 1/24/2020  
Hearing Date: 2/12/2020

## STAFF REPORT: CDP HEARING

**Application Number:** 3-19-0416

**Applicant:** Union Pacific Railroad

**Project Location:** Within the abandoned railroad right-of-way at the intersections of Pico Avenue, Sinex Avenue, and Jewell Avenue in the City of Pacific Grove, Monterey County.

**Project Description:** Construct four six-foot-tall and fifty-foot-wide chain link fence segments within an abandoned railroad right-of-way.

**Staff Recommendation:** Denial

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### SUMMARY OF STAFF RECOMMENDATION

Union Pacific Railroad proposes to construct four six-foot-tall and fifty-foot-wide chain link fence segments (a total of 200 linear feet of fencing) within an abandoned railroad right-of-way (ROW) at the intersections of Pico Avenue, Sinex Avenue, and Jewell Avenue in the City of Pacific Grove. The railroad ROW was originally part of the Monterey Branch rail line, which ran from Pebble Beach and connected to the main Southern Pacific Coast Line near Castroville. The Monterey Branch rail line was built in 1879, service ceased in 1971, and the railroad ROW was officially abandoned in 1979 and the rail infrastructure was subsequently removed. The portion of ROW at issue here extends a little over half a mile between the terminus of Railroad Way and the Del Monte Forest area. This segment is undeveloped and includes a well-worn dirt pathway that passes through residential neighborhoods, which members of the public have used as an informal recreational trail since at least 1981. At the very southern end of the ROW, the informal trail connects with the Del Monte Forest trail system that is a recognized component of the

California Coastal Trail (CCT), and that extends through the forest through to Pebble Beach and ultimately the City of Carmel downcoast, providing access to Asilomar State Beach, Spanish Bay, and the various recreational areas along 17-Mile Drive along the way. The public has generally accessed the ROW trails where it intersects with the public roadways of Jewell Avenue, Pico Avenue, and Sinex Avenue for decades. The proposed project would have the effect of blocking all persons from accessing any portion of the ROW between Jewell Avenue and Sinex Avenue, thus blocking this historic public access use. The Applicant, Union Pacific Railroad, states that the purpose of the project is to keep trespassers off of their property.

The Coastal Act requires that public recreational access be maximized, prioritizes recreational development over other types of development, and specifically protects public access as well as lower-cost visitor and recreational facilities. The 1989 LUP identifies and designates the railroad ROW as “Open Space Recreational” and “Recreational Trail” because the abandoned ROW has historically been utilized, and is suitable for use as, a public recreational facility.<sup>1</sup> Uses within areas designated “Open Space Recreational” and “Recreational Trail” are strictly limited to low-intensity day-use recreational and educational activities, such as walking, nature study, photography and scenic viewing. The LUP specifically prohibits any development within the ROW that would compromise its utility for recreational access.

The proposed chain link fences do not provide any recreational utility, and in fact are proposed specifically to prevent public access and recreational uses within the ROW, despite the fact that the LUP clearly prohibits any development or use within the ROW that is not consistent with low-intensity recreational uses. Moreover, the LUP prohibits any development that would compromise the utility of the ROW for recreational access. And the Coastal Act does not support such impediments to bona fide public recreational access (though it and the Commission recognize that public access may be subject to private property concerns). Thus the fencing proposed here is inconsistent with the LUP and Coastal Act public recreational access policies because the proposed fencing is specifically designed to compromise the utility of the ROW for access, and in fact is intended to completely prohibit such access altogether. In short, the proposed fencing is inconsistent with applicable LUP policies (including as reflected in the parcel’s “Open Space Recreational” and “Recreational Trail” land use designations), as well as with the public recreational access policies of the Coastal Act, and therefore must be denied for this reason.

Additionally, the proposed project is located within a protected scenic native forest that is an important part of the public viewshed in this area. The fencing is not made of natural material, would not blend with the natural environment, and is wholly inconsistent with the protection of scenic forest resources and public views overall. Additionally, the six-foot-tall chain link fences would be located directly adjacent to small residential neighborhoods and such fencing is not compatible with the small town character of the City. The LUP specifically includes policies

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<sup>1</sup> And the City’s complete LCP, approved with suggested modifications by the Commission on November 15, 2019 and accepted by the City Council on January 15, 2020, calls out this area in a similar fashion as Open Space Recreational land that is reserved for low-intensity public access uses. The new LCP is not yet effective until the City’s acceptance of the Commission’s suggested modifications can be reported to the Commission for concurrence, but these designations continue to identify this area for passive recreation and access and are anticipated to apply going forward once the LCP is fully certified.

discouraging the use of chain link fences and encouraging the use of “low mesh fence” in instances where fencing is deemed necessary. Thus, the LUP provides clear guidance that chain link fencing, such as the type proposed here, is not visually compatible with the surrounding area and is therefore inconsistent with LUP and the Coastal Act visual resource policies, even if it were to be approvable otherwise, which it is not.

The Applicant has argued that the chain link fences are necessary to prevent the public from trespassing upon its private property. However, it is worth noting that record evidence indicates that the Applicant has allowed the public to access the ROW since at least 1980 and, with this understanding in mind, the LUP was certified in 1989 designating this parcel as “Open Space Recreational” and “Recreational Trail” (and retaining the same designation in the new LCP). This extensive history of public recreational access at the project site and land use designation by the local government for such access may potentially raise issues of implied dedication. In any event, even considering the Applicant’s private property claims, the Applicant is not *entitled* to the proposed development that is so wholly inconsistent with applicable LCP and Coastal Act policies, and staff recommends denial of the CDP. The motion is found on page 4 below.

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### EXHIBITS

Exhibit 1 – Project Vicinity Map

Exhibit 2 – 1989 LUP Land Use Designation Map

Exhibit 3 – Project Plans

Exhibit 4 – Site Photos

### I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **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 3-19-0416 pursuant to the staff recommendation, and I recommend a **no** vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number 3-19-0416 and adopts the findings set forth below on grounds that the development as conditioned will not be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

## II. FINDINGS AND DECLARATIONS

### A. PROJECT DESCRIPTION

#### Project Location and Background

The proposed project is located along the southernmost portion of an abandoned railroad right-of-way (ROW) that bisects the City of Pacific Grove (see **Exhibit 1** for project vicinity map and **Exhibit 2** for a ROW map). The railroad ROW was part of the Monterey Branch rail line, which historically ran from Pebble Beach and connected to the main Southern Pacific Coast Line near Castroville. The Monterey Branch rail line was built in 1879 and passenger service ceased in 1971. The railroad ROW was officially abandoned in 1979,<sup>2</sup> and the rail lines and related infrastructure were subsequently removed. In 1979, the coastal zone boundary in this area was revised (via AB 462, also known as the Mello Act) to remove the surrounding residential areas in Pacific Grove from the coastal zone, but to specifically retain the railroad ROW as part of the coastal zone. At the time, the ROW was envisioned as a recreational trail and the ROW was retained to help facilitate future development as such.<sup>3</sup> The coastal zone boundary in this area is therefore unusual because the small strip of railroad ROW that cuts through the City is within the coastal zone, but the land surrounding the ROW is outside of the coastal zone (see coastal zone boundary map in **Exhibit 2**).

In 1982, a joint powers agency consisting of the cities of Pacific Grove and Monterey, together with the Monterey Peninsula Regional Park District, acquired the portion of the abandoned ROW between the Custom House Plaza in Monterey and Lovers Point in Pacific Grove. In 1984, that portion of the ROW was paved and formally developed as a recreational trail for pedestrians and cyclists. Today, that recreational trail is an extremely popular portion of the CCT.

Just beyond the paved recreational trail portion of the ROW at Lovers Point, the ROW was sold to a private entity that currently operates a mobile home park in that area, and public access to that segment of the ROW has generally not been available. The ROW then traverses through the publicly owned and publicly accessible Pacific Grove Municipal Golf Links. Between the golf course and Jewell Avenue, the ROW was developed into a paved street, Railroad Way, which is also accessible to the public.

The last segment of the ROW, the portion at issue here, is located between the terminus of Railroad Way and the unincorporated Del Monte Forest area of Monterey County. This segment of the ROW consists of a dirt pathway that passes through residential neighborhoods (see **Exhibit 4** for photos of the ROW). Members of the public have used this segment of the ROW

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<sup>2</sup> Rail lines that are interconnected with national rail infrastructure are subject to federal regulation under the jurisdiction of the United States Department of Transportation. Once a rail line segment is abandoned, such as this one, the line is no longer under federal jurisdiction and is subject to all applicable state and local laws.

<sup>3</sup> At the time, there was a national effort to repurpose abandoned rail lines as recreational trails, including through the passage of the federal Railroad Revitalization and Regulatory Reform Act of 1976. At the time the coastal zone boundary was being revised, the Monterey Branch rail line was specifically targeted by local groups as a potential recreational trail option. Subsequently, some portions of the Monterey Branch rail line were formally repurposed in this way, including through acquisition and formal recreational improvements (e.g., through the City of Monterey and portions of the City of Pacific Grove – see also below).

as an informal recreational trail for decades.<sup>4</sup> At the very southern end of the ROW, the informal trail connects with the Del Monte Forest trail system (that is a recognized component of the CCT) that extends through the forest through to Pebble Beach and ultimately the City of Carmel downcoast, providing access to Asilomar State Beach, Spanish Bay, and the various public recreational areas along 17-Mile Drive along the way. Within Pacific Grove, the public has generally accessed the ROW where it intersects with the public roadways of Jewell Avenue, Pico Avenue, and Sinex Avenue.

### **Project Description**

The proposed project is to construct four six-foot-tall and fifty-foot-wide chain link fence segments (a total of 200 feet of such fencing) within the abandoned railroad ROW where the ROW intersects with Jewell Avenue, Pico Avenue, and Sinex Avenue. The project would block all persons from accessing any portion of the ROW between Jewell Avenue and Sinex Avenue, a distance of over half a mile. See **Exhibit 3** for the exact location of the proposed fences. The Applicant, Union Pacific Railroad, states that the purpose of the project is to keep trespassers off of their property.

### **B. STANDARD OF REVIEW**

The railroad ROW is located within the City of Pacific Grove coastal zone, but the City does not have a certified Local Coastal Program (LCP). The City's Land Use Plan (LUP) was certified in 1991, but the zoning or Implementation Plan (IP) portion of the LCP was not certified at that time. The City recently updated its LUP and developed a new IP, which was approved by the Commission with suggested modifications in November 2019. The current application was submitted in May 2019, prior to Commission approval of the LCP. The City recently accepted the Commission's modifications, but the LCP will not be in effect until the Commission reviews and ultimately certifies the LCP. Until that time, applicants for coastal zone development must still apply to the Coastal Commission directly for coastal development permits. And although the certified 1989 LUP can provide non-binding guidance during the review of such applications, the standard of review is the Coastal Act.

### **C. PUBLIC RECREATIONAL ACCESS**

The Coastal Act includes policies that prioritize visitor serving and recreational uses over other types of development (30213). The Coastal Act also protects existing visitor-serving and recreational facilities, particularly uses that provide lower cost opportunities (30222). Coastal Act Sections 30210, 30211, and 30223 specifically protect public access and recreation. In particular:

*Section 30210. In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational*

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<sup>4</sup> In October 1980, a Pacific Grove Citizens' Committee published a working paper on access and natural resources within the City in preparation for the development of an LCP, which specifically references the railroad ROW in this area being utilized by "walkers and pedestrians," and the ROW at issue here has been utilized by the public for at least forty years.

*opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

**Section 30211.** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

**Section 30213.** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

**Section 30222.** *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

**Section 30223.** *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

In addition to these Coastal Act provisions, the City's 1989 LUP includes a map that designates various areas of the City strictly for open space and recreational uses, including the railroad ROW,<sup>5</sup> which is designated "Recreational Trail." (See **Exhibit 3**). The LUP also includes a series of policies that limit uses within the railroad ROW to those compatible with public access and recreational uses, including:

**LUP Policy 3.3.4.3.** *The following coastal zone areas or facilities shall be reserved for recreation uses and are designated "OSR" (Open Space Recreational) on the LCP Land Use Plan map:*

- *All lands north of Ocean View Boulevard (except Hopkins Marine Station and Monterey Bay Aquarium which are designated Open Space-Institutional) and west of Sunset Drive (with the exception of several residential parcels west of Jewell Avenue which shall retain a residential designation),*
- *All city parks,*
- *Golf course at Lighthouse Reservation,*
- *Abandoned railroad right-of-way between Ocean View Boulevard and City Limits at Spanish Bay (except for easterly spur between Crocker Avenue and Sunset Drive; this easterly spur is an area of deferred certification).*

*Use of these open space areas shall be limited to low-intensity day-use recreational and educational activities such as walking, nature study, photography and scenic viewing, and access to the water for diving, boating, fishing, and swimming. Within the municipal*

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<sup>5</sup> The railroad ROW was owned by Southern Pacific until it merged with Union Pacific in 1996. All property holdings, including the remaining ROW in Pacific Grove, are now owned by Union Pacific Railroad. The 1989 LUP refers to the ROW as the abandoned Southern Pacific ROW.

*golf course, continued use as a public golfing facility will be permitted. Bicycling shall be allowed on designated bike lanes, bike paths, and areas open to other vehicles.*

***LUP Policy 5.5.6.** The abandoned Southern Pacific railroad right-of-way from Lover's Point southwards to the point where it enters the Spanish Bay Resort property shall be designated for public recreational use. No development shall be allowed within the corridor which would compromise its utility for recreational access...*

In sum, the Coastal Act requires that public recreational access be maximized, prioritizes recreational development over other types of development, and specifically protects public access as well as lower-cost visitor and recreational facilities. To carry out these policies, the 1989 LUP identifies and designates the railroad ROW as "Open Space Recreational" and "Recreational Trail" because the abandoned ROW has historically been utilized, and is suitable for use as, a public recreational facility.<sup>6</sup> Uses within areas designated "Open Space Recreational" and "Recreational Trail" are strictly limited to low-intensity day-use recreational and educational activities, such as walking, nature study, photography and scenic viewing. The LUP specifically prohibits any development within the ROW that would compromise its utility for recreational access.

The proposed project consists of the construction of four chain link fences within the railroad ROW. The proposed chain link fences do not provide any recreational utility, and in fact are proposed specifically to preclude public access and recreational uses within the ROW. However, the LUP clearly prohibits any development or use within the ROW that is inconsistent with low-intensity recreational uses. Moreover, the LUP prohibits any development that would compromise the utility of the ROW for recreational access. And the Coastal Act does not support such impediments to bona fide public recreational access (though it and the Commission recognize that public access may be subject to private property concerns). Thus the fencing proposed here is inconsistent with applicable LUP and Coastal Act public recreational access policies because the proposed fencing is specifically designed to compromise the utility of the ROW for access and is intended to completely prohibit such access altogether. Further, the Coastal Act requires the protection of lower-cost recreational facilities, which include the railroad ROW because it is designated for low-cost recreational uses, such as walking and nature study. The proposed project fails to protect the ROW for recreational purposes because it does not provide recreational utility and is designed specifically to prevent recreational uses. In short, the proposed fencing is inconsistent with applicable LUP public access policies (as reflected in the parcel's "Open Space Recreational" and "Recreational Trail" land use designations), as well as with the public recreational access policies of the Coastal Act, and therefore must be denied.

The Applicant argues that the chain link fences are necessary to prevent the public from trespassing upon its private property, and that denial of the fencing would condemn its private property to public uses. However, denial of the project is based upon the proposed project's

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<sup>6</sup> And the City's complete LCP, approved with suggested modifications by the Commission on November 15, 2019 and accepted by the City Council on January 15, 2020, calls out this area in a similar fashion as Open Space Recreational land that is reserved for low-intensity public access uses. The new LCP is not yet effective until the City's acceptance of the Commission's suggested modifications can be reported to the Commission for concurrence, but these designations continue to identify this area for passive recreation and access and are anticipated to apply going forward once the LCP is fully certified.



inconsistency with the Coastal Act (and the LUP) and the fact that the development as proposed cannot be found consistent with applicable LUP and Coastal Act policies (public recreational access policies discussed above, and visual resource policies, discussed below). The denial does not condemn the Applicant's property to public use. Rather, the Applicant's property is specifically designated under the Coastal Act (through the 1989 LUP) for public recreational uses and such a designation has been in place for over 30 years. Further, it is worth noting that record evidence indicates that the Applicant has allowed the public to access the ROW since at least 1980 and, with this understanding in mind, the LUP was certified in 1989 designating this parcel as "Open Space Recreational" and "Recreational Trail" (and retaining the same designation in the new LCP). This extensive history of public recreational access at the project site and land use designation by the local government for such access may potentially raise issues of implied dedication. In any event, even considering the Applicant's private property claims, the Applicant is not *entitled* to the proposed development which is so wholly inconsistent with applicable LCP and Coastal Act policies. The Applicant may apply for any development that is consistent with the "Open Space Recreational" and "Recreational Trail" designations and the Coastal Act's public recreational access policies. However, the proposed fencing, as explained above (and as further explained below), is not consistent with the "Open Space Recreational" and "Recreational Trail" designations and is simply prohibited by the applicable LUP and Coastal Act policies.

In other words, by denying the proposed fencing, the Commission is not *forcing* the Applicant to allow the public to access its property to the extent that the Applicant asserts that it has an interest and right to exclude the public-as-trespassers from using the property. Rather, the Commission is simply denying the proposed development at this time as inconsistent with applicable LUP and Coastal Act policies. The fact that the Applicant has allowed the public to use the abandoned ROW for the last 30 years, which historical context informed the designation of the parcel as "Open Space Recreational" and "Recreational Trail" in the 1989 LUP certification, are also worth noting to put into context the Applicant's current claim that denial of the proposed fencing would result in condemnation of the Applicant's property.

In conclusion, the proposed project is incompatible with the public recreational access policies of the LUP (as reflected in the parcel's "Open Space and Recreational" and "Recreation Trail" land use designations) as well as with the public recreational access policies of the Coastal Act. The Coastal Act requires the protection of public recreational access, including lower-cost recreational facilities, such as the railroad ROW that is designated for such uses, which the proposed project fails to do. Thus the proposed project must be denied.

#### **D. PUBLIC VIEWS**

Coastal Act Section 30251 states:

*Section 30251. The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the*

*California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

The LUP recognizes that although much of Pacific Grove is “built out,” the City has a small-town residential character that should be protected. LUP Policy 3.1.1.4 specifically protects the “scenic native forest within Asilomar Conference Grounds, along Asilomar Avenue, and within the abandoned railroad right-of-way.” The LUP also specifically protects designated open space, requiring that development in be visually compatible with such areas, stating:

***LUP Policy 2.5.4.2.** Within these scenic areas, permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural landforms, to be visually compatible with the open space character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.*

Both the Coastal Act and the LUP recognize that scenic qualities are a significant coastal resource that must be protected. The LUP therefore requires development to be visually compatible with the character of surrounding areas. Development must, if feasible, restore and enhance visually degraded areas and protect scenic areas, such as the scenic native forest within the railroad ROW.

The proposed project includes the construction of four six-foot-tall and 50-foot-long chain link fences within the protected scenic native forest that is located within the ROW, and the public viewshed overall. The fencing is not made of natural material, would not blend with the natural environment, and is wholly inconsistent with the protection of scenic forest resources. Additionally, the six-foot-tall chain link fences would be located directly adjacent to small residential neighborhoods and such fencing is not compatible with the small town character of the City. The LUP actually includes policies specifically designed to *remove existing* chain link fences (such as LUP Policy 5.5.2.g that “Encourage[s] Hopkins Marine Station to replace existing chain link fence”) as opposed to allowing *more* chain link fences. Further, in the designated scenic area of the Lighthouse Reservation, the LUP encourages the use of “low mesh fence” in instances where fencing is deemed absolutely necessary. Thus the LUP provides clear guidance that chain link fencing, such as the type proposed here, is not compatible with the surrounding area, particularly in scenic areas such as the railroad ROW.

In sum, the proposed project is not visually compatible with the surrounding area and is therefore inconsistent with LUP and the Coastal Act visual resource policies as well.

## **E. COASTAL DEVELOPMENT CONCLUSION**

As described above, the proposed project does not conform with the applicable policies of the City’s LUP or the Coastal Act, including because the proposed development is not consistent with the allowed uses within “Open Space Recreational” and “Recreational Trail” designated areas and is not visually compatible with the surrounding area. Given these fundamental inconsistencies, and because the Applicant has not expressed an interest in revising the project in a manner that is Coastal Act and LUP consistent, the Commission does not here identify conditions to make a consistent project in this case, rather the proposed project is denied. Such

denial will allow the Applicant to develop a project that is consistent with the applicable policies of the LUP and Coastal Act, as opposed to the Commission dictating a project that the Applicant has not proposed and does not intend to pursue.

### **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 given that the Applicant has argued that denial of the proposed development will effectively result in condemnation of the property in question. In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional taking, the Coastal Act provides a provision that allows a narrow exception to strict compliance with the Act's regulations based on constitutional takings considerations. Coastal Act Section 30010 provides:

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

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

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

### *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>7</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.). 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 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>8</sup>)).

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<sup>7</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).

<sup>8</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).

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).

#### *A Regulatory Taking Claim is Premature*

Here, although the current project proposal is denied, any takings claim made with respect to denial of this project proposal would be premature. Until the Applicant submits a development proposal consistent with the underlying “Open Space Recreational” and “Recreational Trail” land use designations as discussed in this report, as well as with the policies of the LUP (public access and visual) and the Coastal Act (public recreational access) discussed in this report above, it is the Commission’s position that any claim of takings would be premature because the Commission has not yet had an opportunity to evaluate and potentially approve a project proposal that has been designed to be responsive to the concerns raised in this report and to be consistent with the LUP and Coastal Act. In other words, Commission denial here does not stand for the premise that *no* new proposal is allowed on the project site, but rather that *this* project proposal is not allowable on the project site due to identified inconsistencies.

In sum, the Commission’s decision to deny the proposed development would not result in an unconstitutional taking. Although the regulations require denial of the proposed project at this time, the Applicant may return for a project that adheres to the LUP and Coastal Act requirements. Any takings claim as a result of the current denial would therefore be premature.

## **F. 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.