

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800



F14a

Appeal Filed 3/2/20
49th Day: Waived
Staff: D.Venegas-V
Staff Report: 6/18/20
Hearing Date: 7/10/20

STAFF REPORT: APPEAL – NO SUBSTANTIAL ISSUE

APPEAL NO.: A-4-MAL-20-0136

APPLICANT: City of Malibu Public Works Department

APPELLANT: Bruce Silverstein

LOCAL GOVERNMENT: City of Malibu

LOCAL DECISION: Coastal Development Permit No. 19-018, Variance Nos. 19-011 and 19-013 approved by the Malibu City Council on February 10, 2020

PROJECT LOCATION: 23800.5 Civic Center Way, within the public right-of-way, 4000 Malibu Canyon Road, and 23800 Civic Center Way, City of Malibu, Los Angeles County (APNs: 4458-020-904, 4458-020-900, 4458-030-007 and 4458-028-901)

PROJECT DESCRIPTION: Construction of roadway improvements to widen and improve the profile of the roadway; install sidewalks, bicycle lanes, landscaping, grading, retaining walls, fencing, water quality treatment devices, traffic striping and traffic control signage, and addition of a turn lane from Civic Center Way to Webb Way, including two variances for the reduction of the required 100-foot buffer from an Environmentally Sensitive Habitat Area and the height of a retaining wall in excess of six feet.

STAFF RECOMMENDATION: No Substantial Issue Exists

MOTION AND RESOLUTION: Page 7 & 8

Important Hearing Procedure Note: This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally, and at the discretion of the Chair, testimony is limited to three minutes total per side. Please plan your testimony accordingly. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

The Commission's role at the "substantial issue" phase of an appeal is to decide whether the appeal of the local government action raises a substantial issue with respect to the grounds on which the appeal was filed, which can include a claim that the approved development is not in conformity with the applicable provisions of the certified Local Coastal Program (LCP) or with the public access policies of the Coastal Act (Pub. Res. Code §§ 30210-14). Here, the appellant contends that the approved project is not consistent with the policies of the City of Malibu's certified LCP regarding environmentally sensitive habitat areas (ESHA) and scenic and visual resources. Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal has been filed. The **motion** and **resolution** for "no substantial issue" findings (for which a "yes" vote is recommended) are found on pages 7 and 8.

The City of Malibu approved a Coastal Development Permit (CDP) for construction of roadway improvements along a 0.7-mile long stretch of Civic Center Way. The project consists of improving the curvature of the roadway, installing pedestrian walkways, a new bike lane, wildlife permeable fencing and landscaping on Civic Center Way from Malibu Canyon Road to Webb Way, and the addition of an eastbound right turn lane from Civic Center Way to Webb Way. The Civic Center area within the City of Malibu is a commercial and social focal point where the general public and residents visit, and includes retail shops, restaurants, coffee shops, and other commercial uses. The approved road improvements on the subject stretch of Civic Center Way are necessary to address inadequate sight lines and the lack of safe pedestrian and bicyclist use that pose hazardous conditions for motorists, public transit, bicyclists, and pedestrians. These improvements will enhance traffic safety and mobility for all modes of travel and improve connections between several major resident and visitor serving activity centers.

The City's action was appealed by Bruce Silverstein on the grounds that the project is inconsistent with the City's LCP policies related to the protection of ESHA and scenic and visual resources. Specifically, the appellant contends that the City improperly

applied the policies and provisions that apply to establishing the presence of ESHA. Further, the appeal asserts that the City failed to require the applicant to perform a site-specific biological study, and failed to have the project reviewed by the City Biologist and Environmental Review Board. In this case, the City did not require the applicant to perform a site-specific biological study of the subject site, and further found that the project did not need to be reviewed by the Environmental Review Board. This is inconsistent with Malibu LIP Section 4.3 which establishes the steps required by an applicant to determine the physical extent of ESHA on a project site. However, even though the City erred in not following the formal procedures of LIP Section 4.3; the City instead properly relied on recently performed site-specific biological studies for previous development proposals to determine the extent of ESHA on the project site and surrounding area.

The appeal also contends that the City did not accord all the protections provided for ESHA in the LCP because the City did not properly establish the presence of ESHA on the subject site pursuant to LIP Section 4.3. However, the appellant is incorrect because the City's action did apply the ESHA protection policies and provisions of the LCP to the project. The City found that segments of the existing roadway are already located entirely within the required 100-foot buffer from riparian and wetland ESHA, and the approved project has been sited and designed so that none of the approved improvements (new pavement, sidewalks, drainage improvements, etc.) will be situated any closer to ESHA than the existing disturbed roadway. As such, the project will not result in new ESHA impacts. Additionally, while the project is located within the required 100-foot ESHA buffers, the City determined that there were no alternative development designs or locations that could provide the required 100-foot ESHA buffer or significantly increase the ESHA buffer. Therefore, the roadway improvements were sited and designed to maximize the development's setback from ESHA to the maximum extent feasible consistent with ESHA protection policies and provisions of the LCP. In conclusion, even though the City did not follow the formal procedures contained in the LCP to establish the extent of ESHA on the subject site, the City did rely on substantial evidence to demonstrate the project approved by the City still conforms to the ESHA protection policies and standards of the Malibu LCP.

Additionally, the appeal states that the project does not conform to the policies of the LCP with regards to scenic and visual resources because the City failed to preserve the rural nature and scenic beauty of the area. According to the City's staff report, the project site is adjacent to and visible from Pacific Coast Highway and Malibu Canyon Road, which are identified as scenic roads, and the site is visible from Legacy Park, a designated scenic area, pursuant to the LCP. The City found that the approved roadway improvements and associated development will result in a less than significant visual impact to public views due to the improvements being located along an already developed roadway and the road is visually obstructed by topography in some locations. Furthermore, the approved improvements would not affect any bluewater views and does not block views of the Santa Monica Mountains. Therefore, the project will not have any significant adverse impact on any public views and the approved project

conforms to the scenic and visual resources protection policies and provisions of the City's LCP.

In summary, the City's record includes extensive factual evidence and legal support for the City's findings that the project is consistent with the policies and provisions of the City's LCP. The extent and scope of the subject development on this particular site is relatively small, does not raise issues of regional or statewide significance, and the local action does not set an adverse precedent for future coastal development permit decisions. Although the riparian and ESHA coastal resources at issue in this coastal development permit are significant, the approved project in this case has been sited and limited in a manner that is consistent with the LCP. Therefore, staff recommends that the Commission find that the appellant's contentions raise no substantial issue with regard to the approved project's consistency with the policies and provisions of the City of Malibu's certified LCP.

Table of Contents

I.	APPEAL JURISDICTION AND PROCEDURES	6
A.	APPEAL PROCEDURES.....	6
1.	Appeal Areas.....	6
2.	Grounds for Appeal	6
3.	Substantial Issue Determination.....	6
4.	De Novo Review.....	7
B.	LOCAL GOVERNMENT ACTION AND FILING OF APPEAL	7
II.	STAFF RECOMMENDATION FOR NO SUBSTANTIAL ISSUE:	7
III.	FINDINGS AND DECLARATIONS FOR NO SUBSTANTIAL ISSUE	8
A.	PROJECT DESCRIPTION AND ENVIRONMENTAL SETTING	8
B.	SUMMARY OF APPEAL CONTENTIONS.....	9
C.	ANALYSIS OF SUBSTANTIAL ISSUE	10
1.	Environmentally Sensitive Habitat Area	11
2.	Scenic and Visual Resources.....	18
3.	Factors Considered in Substantial Issue Analysis.....	21

EXHIBITS

[Exhibit 1 Vicinity Map](#)

[Exhibit 2 Aerial Photo](#)

[Exhibit 3 Civic Center Way Improvements Project ESHA Map](#)

[Exhibit 4 Civic Center Way Improvements Project Cross Sections](#)

[Exhibit 5 Appeal by Bruce Silverstein](#)

[Exhibit 6 Final Local Action Notice & City Resolution](#)

I. APPEAL JURISDICTION AND PROCEDURES

A. APPEAL PROCEDURES

The Coastal Act provides that after certification of a local government's Local Coastal Program (LCP), the local government's actions on Coastal Development Permit applications for development in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal development permit actions. During a period of ten working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

1. Appeal Areas

Approval of CDPs by cities or counties may be appealed if the development authorized will be located within certain appealable areas. This includes the areas between the sea and the first public road paralleling the sea; within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is greater; on state tidelands; along or within 100 feet of a wetland or stream; or within 300 feet of the top of the seaward face of a coastal bluff. (Coastal Act Section 30603(a)). Any action on an application for development that constitutes a major public works project or major energy facility may also be appealed to the Commission (Coastal Act Section 30603(a)(5)).

In this case, the project site is located at 23800.5 Civic Center Way, 4000 Malibu Canyon Road, and 23800 Civic Center Way in the City of Malibu. The appeal jurisdiction for this area extends 100 feet from an existing stream course that traverses the Civic Center Wastewater Treatment Facility at 24000 Civic Center Way and 100 feet from an existing mapped wetland on a parcel (APN 4458-021-007) that borders Civic Center Way, as shown on Exhibit 3. As such, the City of Malibu's coastal development permit for the subject project is appealable to the Commission because portions of the road improvements are located within 100 feet of the stream and 100 feet of the wetland.

2. Grounds for Appeal

The grounds for appeal of a local government approval of development shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in the Coastal Act (See Public Resources Code § 30603(b)(1)).

3. Substantial Issue Determination

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that no substantial

issue exists with respect to the grounds of the appeal, the Commission will hear arguments and vote on the “substantial issue” question. A majority vote of the Commissioners present is required to determine that an appeal raises no substantial issue and that the Commission will therefore not review the coastal development permit *de novo*. If the Commission determines that no substantial issue exists, then the local government’s coastal development permit action will be considered final.

4. De Novo Review

Should the Commission determine that a substantial issue exists, the Commission will consider the CDP application *de novo*. The applicable test for the Commission to consider in a *de novo* review of the project is whether the proposed development is in conformity with the certified LCP and, if the development is between the sea and the first public road paralleling the sea, the public access and recreation policies of the Coastal Act. If a *de novo* hearing is held, testimony may be taken from all interested persons.

B. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

The project that is the subject of this appeal was approved by the City of Malibu Planning Commission on December 2, 2019. The action by the Planning Department was appealed to the Malibu City Council by the applicant (City of Malibu Public Works Department) on December 11, 2019. The appeal was upheld and the permit for the project was approved by the Malibu City Council on February 10, 2020. The City’s Notice of Final Action for the project was received by Commission staff on February 18, 2020 (Exhibit 6) Commission staff provided notice of the ten working day appeal period, which began on February 18, 2020 and ended on March 3, 2020. Bruce Silverstein filed the subject appeal on March 2, 2020, during the Commission’s appeal period (Exhibit 5). Commission staff notified the City, the applicant, and all interested parties that were listed on the appeal and requested that the City provide its administrative record for the permit. The administrative record was received on March 11, 2020. Pursuant to Section 30621(a) of the Coastal Act, a hearing on an appeal shall be set no later than 49 working days after the date on which the appeal is filed with the Commission, which would be May 11, 2020. However according to Section 30625(a), the applicant can waive that time limit. On March 11, 2020, prior to expiration of the 49-working day deadline for Commission action, the applicant waived its right to a hearing within 49 working days.

II. STAFF RECOMMENDATION FOR NO SUBSTANTIAL ISSUE:

MOTION: I move that the Commission determine that Appeal No. A-4-MAL-20-0136 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed under §30603 of the Coastal Act.

STAFF RECOMMENDATION:

Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo, and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present (i.e., a tied vote results in a finding that a “substantial issue” is raised).

RESOLUTION TO FIND NO SUBSTANTIAL ISSUE:

The Commission finds that Appeal No. A-4-MAL-20-0136 does not present a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

III. FINDINGS AND DECLARATIONS FOR NO SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND ENVIRONMENTAL SETTING

The Malibu City Council approved the subject CDP for construction of roadway improvements along Civic Center Way between Malibu Canyon Road and Webb Way, within the public right-of-way of each roadway, to widen and improve the profile of the roadway; install sidewalks, bicycle lanes, landscaping, grading, wildlife-permeable fencing, water quality treatment devices, retaining walls, traffic striping and traffic control signage, and the addition of an eastbound right turn lane from Civic Center Way to Webb Way (Exhibits 1-2). Temporary staging for the project is proposed to take place on a City-owned vacant property located at 23800 Civic Center Way (APN No. 4458-020-904 and 4458-020-900). The project also includes two variances for the reduction of the required 100-foot buffer from an environmentally sensitive habitat area (Variance No. 19-013) and for the construction of a retaining wall in excess of six feet in height (Variance No. 19-011).

The project is located along a 0.7 mile stretch of Civic Center Way between Malibu Canyon Road and Webb Way within the City’s Civic Center area. The project site is surrounded by Pepperdine University, Our Lady of Malibu Catholic Church and School, multi-family residential development, and undeveloped open space. The Civic Center Wastewater Treatment Facility is located west and south of the project. Malibu City Hall, Malibu Library, Legacy Park, and Malibu Lagoon State Park, and the retail shops, restaurants, coffee shops and other commercial uses of the Civic Center are located nearby. The Civic Center Way improvements project is being undertaken to address several constraints that pose hazardous conditions for motorists, bicyclists, and pedestrians, including non-standard horizontal and vertical alignment elements which

impair sight lines, minimal pedestrian access and use, shared road use for bicyclist/pedestrians/motorist/transit, and minimal segment connectivity. The project consists of improving the curvature of the roadway, installing pedestrian walkways, a new bike lane, and landscaping on Civic Center Way from Malibu Canyon Road to Webb Way (Exhibit 3). These improvements will enhance traffic safety and mobility for all modes of travel and connect several major resident and visitor serving activity centers.

The project site is not within an area designated Environmentally Sensitive Habitat Area (ESHA) on the Malibu LCP ESHA and Marine Resources Map. However, segments of the existing Civic Center Way roadway are located entirely within the 100 foot buffer around a mapped wetland designated ESHA on the Malibu LCP ESHA Map on an adjacent vacant parcel (APN No. 4458-021-007) known as the Smith parcel to the north (Exhibit 3), and entirely within the 100 foot buffer around riparian ESHA located on the Civic Center Wastewater Treatment Facility property located at 24000 Civic Center Way (Exhibit 3). Although the proposed project is located within 100 feet of ESHA, the proposed improvements are located within the existing disturbed roadway and the public road right-of-way of Civic Center Way. No native trees are proposed to be removed for the proposed project.

B. SUMMARY OF APPEAL CONTENTIONS

The appeal filed by Bruce Silverstein is attached as Exhibit 5. The appeal contends that the approved project is not consistent with the policies and provisions of the City of Malibu's certified LCP related to environmentally sensitive habitat areas (ESHA) and scenic and visual resources. Specifically, the appellant raises an issue with respect to consistency with Section 4.3 (ESHA Determination) of the City's Local Implementation Plan, which states that any area not designated on the ESHA Overlay Map that meets the "environmentally sensitive habitat area" definition is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The appellant also states that the City failed to require the applicant to perform a site-specific biological study, failed to determine the physical extent of habitat meeting the legal definition of ESHA on the subject property, and failed to require that the approved project be reviewed by the City Biologist and Environmental Review Board. Additionally, the appeal contends that the project does not conform to the policies of the LCP with regards to scenic and visual resources because the City failed to preserve the rural nature and scenic beauty of the area. Staff has reviewed the appellant's stated concerns in the context of the relevant specific LCP policies and provisions in an effort to fully characterize the nature of the appellant's contentions, even in those instances where specific citations to LCP policies were not included in the appeal. The relevant LCP provisions are therefore interpreted and analyzed as the basis of the appellant's contentions, as detailed in the sections below.

Moreover, the appeal claims the approved development will transform a rural side-road into an alternative to Pacific Coast Highway and will contribute to the urbanization of the area. Additionally, the appellant claims that the approved project is not supported by

proper fact-finding by the City Council. However, these three claims do not point to an inconsistency with any specific policy or provisions of the certified Malibu LCP, or with the public access and recreation policies of the Coastal Act. Therefore, they are not grounds for appeal. Furthermore, the appellant asserts that the City improperly granted a variance to allow for a property along a scenic highway to be used as a staging area for the approved project. However, this is incorrect as the City's action did not include the granting of a variance on the temporary construction staging area located on a City-owned property. The project only included variances for the reduction of the required 100-foot buffer from ESHA and for the construction of a retaining wall in excess of six feet in height along Civic Center Way. Additionally, the appeal contends that the approved project is not consistent with the Malibu's Municipal Code's (MMC) Mission statement with regards to preserving the rural nature and scenic beauty of the area. Further, the appeal states that the MMC mission statements are a prism through which the LCP has to be viewed. However, the MMC is not a part of the City's LCP, and thus the policies and provisions of the MMC are not the standard of review for the subject CDP and are not relevant to this appeal. Therefore, the appellant's contention that the project is not consistent with the MMC mission statement and the other four above-mentioned claims are not valid grounds for an appeal.

C. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Section 30603 and 30625 of the Coastal Act, the appropriate standard of review for an appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the locally-approved project's conformity to the policies contained in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. In this case, the appellants cited the LCP's policies related to environmentally sensitive habitat areas and visual resources.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603 (§30625(b)(2)). Section 13115(c) of the Commission's regulations provides that the Commission may consider various factors when determining if a local action raised a significant issue, including but not limited to the following five factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretation of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to a factor.

In this case, for the reasons discussed below, the Commission determines that the appeal raises no substantial issue with regards to the grounds on which the appeal has been filed.

1. Environmentally Sensitive Habitat Area

The appeal states that the City improperly applied the policies and provisions that apply to determining the presence of ESHA not already designated on the LUP ESHA Map, as required by LIP Section 4.3. Specifically, the appellant claims that the City failed to require the applicant to perform a site-specific biological study to determine the physical extent of habitat meeting the legal definition of ESHA (LIP Section 4.3(A)), and that the City failed to require that the approved project be reviewed by the City Biologist and Environmental Review Board (LIP Section 4.3(D)). The appellant also claims that the City did not accord all the protection provided for ESHA in the LCP because the City did not properly establish the presence of ESHA on the subject site. Although the appeal did not identify specific LCP policies that establish ESHA protection that was not accorded by the City's approval, the following ESHA and wetland policies of the City of Malibu LCP pertain to the subject development.

Coastal Act Section 30240, as incorporated into the certified LCP, states:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreational areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Land Use Plan Policy 3.1 states:

Areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments are Environmentally Sensitive Habitat Areas (ESHAs) and are generally shown on the LUP ESHA Map. The ESHAs in the City of Malibu are riparian areas, streams, native woodlands, native grasslands/savannas, chaparral, coastal sage scrub, dunes, bluffs, and wetlands unless there is site-specific evidence that establishes that a habitat area is not especially valuable because of its special nature or role in the ecosystem. Regardless of whether streams and wetlands are designated as ESHA, the policies and standards in the LCP applicable to streams and wetlands shall apply. Existing, legally established agricultural uses, confined animal facilities, and fuel modification areas required by the Los Angeles County Fire Department for existing, legal structures do not meet the definition of ESHA.

Land Use Plan Policy 3.4 states:

Any area not designated on the LUP ESHA Map that meets the ESHA criteria is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The following areas shall be considered ESHA, unless there is compelling site-specific evidence to the contrary:

- a. Any habitat area that is rare or especially valuable from a local, regional, or statewide basis.
- b. Areas that contribute to the viability of plant or animal species designated as rare, threatened, or endangered under State or Federal law.
- c. Areas that contribute to the viability of species designated as Fully Protected or Species of Special Concern under State law or regulations.
- d. Areas that contribute to the viability of plant species for which there is compelling evidence of rarity, for example, those designated 1b (Rare or endangered in California or elsewhere) or 2 (rare, threatened or endangered in California but more common elsewhere) by the California Native Plant Society.

Land Use Plan Policy 3.8 states:

Environmentally Sensitive Habitat Areas (ESHAs) shall be protected against significant disruption of habitat values, and only uses dependent on such resource shall be allowed within such areas.

Land Use Plan Policy 3.14 states:

New development shall be sited and designed to avoid impacts to ESHA. If there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected. Impacts to ESHA that cannot be avoided through the implementation of siting and design alternatives shall be fully mitigated, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site or where off-site mitigation is more protective in the context of a Natural Community Conservation Plan that is certified by the Commission as an amendment to the LCP. Mitigation shall not substitute for implementation of the project alternative that would avoid impacts to ESHA.

Land Use Plan Policy 3.23 states:

Development adjacent to ESHAs shall minimize impacts to habitat values or sensitive species to the maximum extent feasible. Native vegetation buffer areas shall be provided around ESHAs to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect. All buffers shall be a minimum of 100 feet in width, except for the case addressed in Policy 3.27.

Land Use Plan Policy 3.28 states:

Variations or modifications to buffers or other ESHA protection standards shall not be granted, except where there is no other feasible alternative for siting the development and it does not exceed the limits on allowable development pursuant to Policies 3.10-3.13.

Land Use Plan Policy 3.37 states:

New development within or adjacent to ESHA shall include a detailed biological study of the site.

Land Use Plan Policy 3.39 states:

The Environmental Review Board (ERB), in consultation with the City Biologist, shall review development within or adjacent to designated ESHA or other areas containing ESHA identified through a biological study as required pursuant to Policy 3.37. The ERB shall consider the individual and cumulative impacts of the development on ESHA, define the least environmentally damaging alternative, and recommend modification or mitigation measures to avoid or minimize impacts. The City may impose a fee on applications to recover the cost of review of a proposed project by the ERB when required by this policy.

Land Use Plan Policy 3.40 states:

The ERB shall make recommendations on all projects reviewed under Policy 3.38 to applicable decision making body (Planning Manager, Planning Commission, or City Council). Any recommendation of approval shall include an identification of the preferred project alternative, required modifications, or mitigation measures necessary to ensure conformance with the LUP. The decision making body (Planning Manager, Planning Commission, or City Council) shall make findings relative to the project's conformance to the recommendations of the ERB.

Land Use Plan Policy 3.88 states:

Buffer areas shall be provided around wetlands to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the wetland they are designed to protect, but in no case shall they be less than 100 feet in width.

Land Use Plan Policy 5.5 states:

The Environmental Review Board shall review and make written recommendations on development proposals within or adjacent to ESHA or other areas containing ESHA as identified through a biological study. The decision-

making body (Planning Manager, Planning Commission, or City Council) shall make written findings relative to the project's conformance with the recommendations of the Environmental Review Board.

Additionally, more specific provisions with regards to ESHA determination are found in the Implementation Plan portion of the City's LCP.

Local Implementation Plan Section 4.3 (ESHA Determination) states:

- A. Any area not designated on the ESHA Overlay Map that meets the "environmentally sensitive area" definitions (Chapter 2 of the Malibu LIP) is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The City shall determine the physical extent of habitat meeting the definition of "environmentally sensitive area" on the project site, based on the applicant's site-specific biological study, as well as available independent evidence.
- B. Unless there is site-specific evidence that establishes otherwise, the following habitat areas shall be considered to be ESHA:
 - 1. Any habitat area that is rare or especially valuable from a local, regional, or statewide basis.
 - 2. Any habitat area that contributes to the viability of plant or animal species that are designed or are candidates for listing as rare, threatened, or endangered under State or Federal law.
 - 3. Any habitat area that contributes to the viability of species that are designated "fully protected" or "species of special concern" under State law or regulations.
 - 4. Any habitat area that contributes to the viability of species for which there is other compelling evidence or rarity, for example plant species eligible for state listing as demonstrated by their designation as "1b" (Rare or endangered in California and elsewhere) or designation as "2" (rare, threatened or endangered in California but more common elsewhere) by the California Native Plant Society.
 - 5. Any designated Area of Special Biological Significance, or Marine Protected Area.
 - 6. Streams.
- C. If the applicant's site-specific biological study or other independent information contains substantial evidence that an area previously shown on the ESHA overlay does not contain habitat that meets the definition of "environmentally sensitive area" on the project site.
 - 1. Any area mapped as ESHA shall not be deprived of protection as ESHA, as required by the policies and provisions of the LCP, on the basis that habitat has been illegally removed, degraded, or species that are rare or especially valuable because of their nature or role in an ecosystem have been eliminated.

2. If the City finds that an area previously mapped as ESHA does not meet the definition of ESHA, a modification shall be made to the Malibu LUP ESHA Map and the Malibu LIP ESHA overlay map. Such a modification shall be considered an LCP amendment, subject to approval by the Coastal Commission.
 3. If an area is not ESHA or ESHA buffer, LCP policies and standards for protection of ESHA and ESHA buffer shall not apply and development may be permitted (consistent with all other LCP requirements) even if the LUP ESHA Map and ESHA Overlay Map have not yet been amended.
- D. In addition to the findings required in Section 13.9 of the Malibu LIP, the City shall make findings as to the physical extent of habitat meeting the definition of environmentally sensitive habitat on the project site, based on the applicant's site specific biological study, available independent evidence, and review by the City biologist and the Environment Review Board.

Local Implementation Plan Section 4.4.4 (Exceptions), in relevant part, states:

The following types of development shall not be subject to the provisions of Section 4.4.2 of the Malibu LIP with regards to the supplemental application requirement of a detailed biological study of the site, and shall not be subject to review by the Environmental Review Board:

...

C. Demolition of an existing structure and construction of a new structure within the existing building pad area where no additional fuel modification is required.

Discussion:

The City-approved project includes construction of roadway improvements along Civic Center Way between Malibu Canyon Road and Webb Way, within the roadway's public right-of-way, to widen and improve the profile of the roadway. These improvements include grading to improve and widen the profile of the roadway; installation of two retaining walls; addition of an eastbound right turn land from Civic Center Way to Webb Way; installation of sidewalks, wildlife-permeable fencing, concrete curbs and gutters, water quality treatment devices, traffic control signage and landscaping.

LUP Policy 3.1 of the certified LCP defines ESHA to include, among other resources, streams and riparian areas. The Malibu LUP ESHA Map contains most known watercourses and ESHA locations throughout the Malibu Coastal Zone. Even resources not depicted on the Malibu ESHA Map are to be considered ESHA if the resources meet certain criteria (pursuant to LUP Policy 3.4 and LIP Section 4.3(A)), including any habitat area that is rare or especially valuable from a local, regional, or statewide basis. LUP Policy 3.14 requires new development to be sited and designed to avoid impacts to

ESHA, and if there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected. Additionally, LUP Policy 3.23 and Policy 3.88 require a minimum 100-foot buffer from ESHA and wetlands, to ensure development is at a distance sufficient to avoid impacts to the ESHA and/or wetlands.

According to the City's staff report, the project site (0.7 mile stretch of Civic Center Way) is not designated ESHA on the Malibu LCP ESHA Map. However, as stated previously, segments of the 0.7 mile stretch of Civic Center Way are located within 100 feet of wetland ESHA located on an adjacent vacant Smith parcel and within 100 feet of riparian ESHA located on the Civic Center Wastewater Treatment Facility property. Exhibit 4 illustrates the locations of the approved roadway improvements and their proximity to areas designated ESHA.

The appeal states that the City improperly applied the policies and provisions that apply to determining the presence of ESHA not already designated on the LUP ESHA Map, as required by LIP Section 4.3. Furthermore, the appellant claims that the City failed to require the applicant to perform a site-specific biological study to determine the physical extent of habitat meeting the legal definition of ESHA (LIP Section 4.3(A)), and that the City failed to require the approved project be reviewed by the City Biologist and Environmental Review Board (LIP Section 4.3(D)).

Based on the record in this case, the City did fail to require the applicant to perform a site-specific biological study of the subject roadway and adjacent areas, as required by LIP Section 4.3(A). Instead, the City relied on existing biological studies that had been completed for other projects near the proposed road improvements. Specifically, the City relied on an existing site-specific habitat assessment done for the Malibu Civic Center Wastewater Treatment Facility (WTF) Project (Habitat Assessment for the Proposed Malibu Civic Center WTF, prepared by ICF International, dated October 23, 2014) to determine the physical extent of ESHA on the Malibu Civic Center WTF property near the road improvements. Further, the City relied on the previously approved Coastal Commission CDP No. 5-85-529-A2, whereby the Commission required restoration of a wetland on the site done in accordance to a restoration plan approved and reviewed by the Executive Director, to determine the physical extent of wetlands on the Smith parcel that is near the road improvements. Although, the information in the wetland restoration plan is approximately 30 years old, the plan was still viable to use as a basis for establishing the presence of ESHA on the related Smith property. Further, it was reasonable for the City to rely on an older report in this case because, in an abundance of caution, they designed the improvements in that location to not extend beyond the existing disturbed roadway.

Additionally, the City failed to require the project be reviewed by the Environmental Review Board (ERB); however, the City did require the project be reviewed by the City's Biologist consistent with LIP Section 4.3(D). The City's action found that because the project takes place in previously disturbed areas, review by the ERB was not required, pursuant to LIP Section 4.4.4(C). However, LIP Section 4.4.4(C) states that "demolition

of an existing structure and construction of a new structure within the existing building pad area where no additional fuel modification is required” shall not be subject to review by the ERB. Since the subject project does not involve the demolition and construction of a new structure but rather the addition of improvements to an existing roadway, the noted exemption does not appear to apply and therefore the project should have been reviewed by the ERB pursuant to the LCP. So, it appears that the City erred in not following the formal procedures of LIP Section 4.3 to establish the presence of ESHA not already designated on the LUP ESHA Map. Nonetheless, even though the City failed to comply with the requirements of LIP Section 4.3 by requiring the applicant to perform a site-specific biological study and require the project to be reviewed by the ERB, in this case the City did analyze previously performed site-specific biological studies of the surrounding area as evidence in the record to determine the extent of ESHA on the project site and surrounding areas. Therefore, the intent of LIP Section 4.3, which is to determine the physical extent of ESHA, was still met in the City’s action.

The appeal also contends that the City did not accord all the protection provided for ESHA in the LCP because the City did not properly establish the presence of ESHA on the subject site. However, as described within the City’s staff report, the City’s action did apply the ESHA protection policies and provisions of the LCP on the properties directly adjacent to roadway that contain wetland and riparian ESHAs. Furthermore, the City made findings that segments of the existing roadway are located entirely within the required 100-foot riparian and wetland ESHA buffers and there is no feasible project alternative to avoid encroachment into the ESHA buffers and perform road improvements to the roadway. The approved roadway improvements located within ESHA buffers were sited and designed to not extend past the existing asphalt roadway prism, and at these locations the back edge of the approved sidewalk improvements match the existing road asphalt (Exhibits 3 & 4).

Specifically, there are two segments of roadway improvements that are located within known ESHA buffers. Exhibits 6 and 7 include representative cross sections of the improvements for each of these segments. The first segment is located adjacent to the Civic Center Wastewater Treatment Facility property and is referenced as cross section “C” on Exhibits 3 and 4. As can be seen on Exhibit 4, at this location the proposed limits of improvements on the south side of the roadway nearest to the riparian ESHA will not extend past the existing asphalt roadway prism. The second segment is located adjacent to the vacant Smith parcel (APN No. 4458-021-007) and is referenced as cross section “B” on Exhibits 3 and 4. As shown on Exhibit 4, at this location the proposed limits of improvements on the north side of the roadway nearest to the wetland ESHA will also not extend past the existing asphalt roadway prism.

Additionally, there is a third segment of roadway improvements that is adjacent to potential wetland ESHA. This segment is located adjacent to a vacant parcel known as the Bell property (APN No. 4458-021-175) and this segment is referenced as cross section “A” on Exhibits 3 and 4. It’s important to note that the question of whether or not there are potential wetlands on the Bell property is the subject of a pending Coastal Commission appeal (Appeal No. A-4-MAL-19-0188). As can be seen on Exhibit 4, the

approved improvements on the north side of the roadway adjacent to the Bell property will also not extend past the existing asphalt roadway prism.

Therefore, none of the approved improvements (new pavement, sidewalks, drainage improvements, etc.) will be situated any closer to ESHA (or potential ESHA) than the existing disturbed roadway, or encroach further into any ESHA buffer areas. Additionally, while the project is located within the required 100-foot ESHA buffers, the City determined that there were no alternative development locations that could provide the required 100-foot ESHA buffers or significantly increase the ESHA buffers.

Civic Center Way is an existing two-lane roadway that was constructed prior to the effective date of the Coastal Act. This road is necessary for local circulation and for public access to coastal areas. It is not feasible to re-site the road to provide a buffer of 100 feet or even an increased ESHA buffer in this case. While the addition of new pavement, sidewalks, drainage improvements, etc. does not itself conform to the 100 foot buffer policies of the LCP, such development does not extend any closer to ESHA than the existing roadway and requires no additional fuel modification. As such, the approved development will have no impacts on ESHA. While it is true that the approved development does not meet the technical requirements of the LUP policies and provisions for an ESHA buffer width to be a minimum of 100 feet, the City made the required findings to approve a variance (Variance No. 19-013) of this standard, consistent with LUP Policy 3.28. In this unique case, the approved development is sited and designed to prevent impacts which would significantly degrade the buffer area and is compatible with the continuation of the nearby ESHA, and the ESHA is protected from any significant disruption of habitat values, as required by the remaining ESHA protection policies and provisions of the LCP.

In conclusion, even though portions of the project are located within the required ESHA buffer, there are no alternative development locations that could provide the required buffer or significantly increase the existing buffer. The approved project was sited and designed to maximize the development's setback from ESHA to the maximum extent feasible and was sited and designed to avoid any significant adverse impacts to ESHA. As such, the project approved by the City conforms to the ESHA protection policies and standards of the Malibu LCP. The Commission finds that the appellant's contentions regarding development adjacent to ESHA do not raise a substantial issue with regards to consistency with the policies and provisions of the City's LCP.

2. Scenic and Visual Resources

The appellant contends that the project, as approved by the City, does not conform to the policies of the LCP with regards to scenic and visual resources because the City failed to preserve the rural nature and scenic beauty of the area. Staff has reviewed the appellant's stated concerns in the context of specific LCP policies and provisions in an effort to fully characterize the nature of the appellant's contentions, even in those instances where specific citations to LCP policies were not included in the appeal. The

relevant LCP provisions are therefore interpreted and analyzed as the basis of the appellant's contentions, as detailed below.

Coastal Act Section 30251, as incorporated into the certified LCP, states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

Land Use Plan Policy 6.2 states:

Places on and along public roads, trails, parklands, and beaches that offer scenic vistas are considered public viewing areas. Existing public roads where there are views of the ocean and other scenic areas are considered Scenic Roads. Public parklands and riding and hiking trails which contain public viewing areas are shown on the LUP Park Map. The LUP Public Access Map shows public beach parks and other beach areas accessible to the public that serve as public viewing areas.

Land Use Plan Policy 6.3 states:

Roadways traversing or providing views of areas of outstanding scenic quality, containing striking views of natural vegetation, geology, and other unique natural features, including the ocean shall be considered Scenic Roads. The following roads within the City are considered Scenic Roads:

- a. Pacific Coast Highway
- b. Decker Canyon Road
- c. Encinal Canyon Road
- d. Kanan Dume Road
- e. Latigo Canyon Road
- f. Corral Canyon Road
- g. Malibu Canyon Road
- h. Tuna Canyon Road

Land Use Plan Policy 6.5 states:

New development shall be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent. If there is no feasible building site location on the proposed project site where development would not be visible, then the development shall

be sited and designed to minimize impacts on scenic areas visible from scenic highways or public viewing areas, through measures including, but not limited to, siting development in the least visible portion of the site, breaking up the mass of new structures, designing structures to blend into the natural hillside setting, restricting the building maximum size, reducing maximum height standards, clustering development, minimizing grading, incorporating landscape elements, and where appropriate, berming.

Discussion:

The project approved by the City consists of roadway improvements to widen and improve the profile of the roadway along Civic Center Way between Malibu Canyon Road and Webb Way. These improvements include grading to improve the profile of the road, installation of two retaining walls; addition of an eastbound right turn land from Civic Center Way to Webb Way; installation of sidewalks, wildlife-permeable fencing, concrete curbs and gutters, water quality treatment devices, traffic control signage, and landscaping.

One of the primary objectives of the Coastal Act and the City's LCP is the protection of scenic and visual resources, particularly as viewed from public places. Section 30251 of the Coastal Act, which is incorporated into the City's LCP, requires that development be sited and designed to protect views to and along the ocean and other scenic coastal areas. The Malibu certified LUP requires protection of scenic areas and coastal views from public viewpoints. LUP Policy 6.2 defines "public viewing areas," in part, as public roads and trails that offer scenic vistas, and states that existing public roads where there are views of the ocean and other scenic areas are considered Scenic Roads. Furthermore, LUP Policy 6.5 requires new development to be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent.

The appellant contends that the project, as approved by the City, does not conform to the policies of the LCP with regards to scenic and visual resources because the City failed to preserve the rural nature and scenic beauty of the area. According to the City's staff report, the project site is adjacent to and visible from Pacific Coast Highway and Malibu Canyon Road, which are identified as scenic roads pursuant to LUP Policy 6.3. Further, the site is visible from Legacy Park, a designated scenic area under LUP Policy 6.3. The City found that based on a site reconnaissance, site photos, and the nature of the surrounding area, the approved roadway improvements and associated development will not result in significant visual impacts on scenic areas due to the improvements being located along an already developed roadway and the road is visually obstructed by topography in some locations. Additionally, the approved retaining walls (6 ft. and 13.5 ft. tall) along a segment of the road that is adjacent to a multi-family housing development will not pose a significant adverse scenic impact from Pacific Coast Highway because the wall will be partially obstructed by topography. Additionally, the project's planting palette would match Legacy Park's plantings and the surrounding natural environment, consistent with LUP Policy 6.5 and Coastal Act

Section 30251. Furthermore, the approved improvements will not affect any bluewater views or block views of the Santa Monica Mountains. Therefore, the project will not have any significant adverse impact on any public views.

Additionally, the City approved temporary construction staging for the project on a City-owned vacant property located at 23800 Civic Center Way (APN No. 4458-020-904 and 4458-020-900). Although this site is highly visible from Pacific Coast Highway, this site is currently disturbed and has been utilized as a construction staging area for several other projects in the City throughout the years (Exhibit 2).

Moreover, to address the claim by the appellant regarding the City failing to protect the rural nature/character of the site, the Malibu LCP contains scenic and visual resource protection policies and provisions to require new development to protect views to and along the ocean and scenic coastal areas, and be visually compatible with the character of surrounding areas. However, the Malibu LCP does not contain any policies or provisions requiring the preservation, in particular, of the rural nature/character of a site. Therefore, the claim regarding the project failing to protect the rural nature/character of the site is not a valid ground for appeal.

For all these reasons, the Commission finds that the City-approved project conforms to the scenic and visual resources protection policies and provisions of the City's LCP. Therefore, the Commission finds that the appellant's contentions regarding these issues do not raise a substantial issue with regards to consistency with the policies and provisions of the City's LCP.

3. Factors Considered in Substantial Issue Analysis

The standard of review for the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellants relative to the appealable development's conformity to the policies contained in the certified LCP and the public access policies of the Coastal Act. In this case, the appeal cites environmentally sensitive habitat areas and scenic and visual resources policies and provisions of the Malibu LCP. The Commission's regulations indicate that the Commission will hear an appeal unless it "finds that the appeal raises no substantial issue[.]" (Cal. Code Regs., Title 14, Section 13115(b).) Section 13115(c) of the Commission's regulations provides that the Commission may consider various factors when determining if a local action raises a substantial issue, including but not limited to the five factors that are addressed below.

The first factor in evaluating the issue of whether the appeal raises a substantial issue is the degree of factual and legal support for the local government's decision that the development is consistent with the subject provisions of the certified LCP. In this case, the City's record includes extensive factual evidence and legal support for the City's findings that the project is consistent with the ESHA and scenic and visual resources policies and provisions of the certified LCP. There is substantial evidence in the City's record demonstrating that the approved project is sited and designed to avoid ESHA impacts. Civic Center Way is an existing two-lane roadway that was constructed prior to

the effective date of the Coastal Act. While the addition of new pavement, sidewalks, drainage improvements, etc. does not itself conform to the 100 foot buffer policies of the LCP, such development does not extend any closer to ESHA than the existing roadway. As such, the approved development will have no impacts on ESHA. While it is true that the approved development does not meet the technical requirements of the LUP policies and provisions for an ESHA buffer width to be a minimum of 100 feet, the City made the required findings to approve a variance of this standard, consistent with the LCP. In this unique case, the approved development is sited and designed to prevent impacts which would significantly degrade the buffer area and is compatible with the continuation of the nearby ESHA, and the ESHA is protected from any significant disruption of habitat values, as required by the remaining ESHA protection policies and provisions of the LCP. Further, the City's record includes substantial evidence that demonstrates the project conforms to scenic and visual resource protection policies and provisions of the LCP, as explained in detail above.

The second factor in evaluating the issue of whether the appeal raises a substantial issue is the extent and scope of the development as approved. As described above, the approved project involves roadway improvements along an 0.7 mile stretch of existing roadway. Given that the project site is already a roadway and the relatively minor level of improvements, the extent and scope of additional development on the site is relatively small. Aside from the retaining walls, all additional development is low-lying and will not drastically expand the scope of this pre-coastal roadway.

The third factor in evaluating the issue of whether the appeal raises a substantial issue is the significance of coastal resources affected by the decision. In this case, the project site is an existing developed roadway located in a developed residential and commercial community. Although portions of the existing roadway are located entirely within the 100-foot buffer of riparian and wetland ESHA, and riparian areas and wetlands are considered extremely significant coastal resources that are accorded maximum protection under the Malibu LCP, the roadway already represents development within that buffer, and the proposed development will not result in any development any closer than the roadway already is. Thus, those resources would not actually be affected by this project.

The fourth factor in evaluating the issue of whether the appeal raises a substantial issue is the precedential value of the local government's decision for the future interpretation of its LCP. In this case, the approved project is consistent with the policies and provisions of the LCP. Specifically, the LCP allows for a reduced ESHA buffer on this specific project site if there is no feasible alternative for siting the development on the site. None of the approved improvements (new pavement, sidewalks, drainage improvements, etc.) will be situated any closer to ESHA than the existing disturbed roadway, or encroach further into any ESHA areas, and as such, will not result in new ESHA impacts. Even though the City did not follow the formal ERB review procedures consistent with the LCP to establish the extent of ESHA on the subject site, the City did rely on substantial evidence to demonstrate the project, as sited and designed,

conforms to the ESHA protection policies and standards of the Malibu LCP. As such, the City's decision will have no adverse precedential value for future CDP decisions.

The fifth factor in evaluating the issue of whether the appeal raises a substantial issue is whether the appeal raises only local issues, or those of regional or statewide significance. The appeal raises an issue about wetland and ESHA protection which is important from a statewide standpoint. However, in this case, the approved project is consistent with the policies and provisions of the LCP, will not result in any adverse impacts to significant coastal resources. As such this appeal does not present issues of regional or statewide significance.

In conclusion, the Commission finds that in consideration of the factors above, on balance, the appeal fails to raise a substantial issue. For the reasons discussed above, the Commission finds that the appeal raises no substantial issue with respect to the consistency of the approved development with the policies of the City's certified LCP. Applying the five factors identified above, the Commission finds the City's record adequately supports its position that the proposed project is consistent with the applicable LCP policies. In addition, the development is relatively small in scope, does not have a significant adverse effect on significant coastal resources, would not be an adverse precedent for future coastal development permits, and does not raise issues of regional or statewide significance. Therefore, the Commission finds that the appeal does not raise a substantial issue with respect to the grounds on which it was filed.

APPENDIX A – Substantive File Documents

Certified City of Malibu Local Coastal Plan; Malibu Planning Commission Agenda Report for CDP No. 19-011 dated December 2, 2019; Malibu City Council Agenda Report for Appeal No. 19-009 dated February 10, 2020.