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Action Deadline: None
Staff: Brian O'Neill - SC
Substantial Issue: 10/18/2019
Staff Report: 6/19/2020
Hearing Date: 7/9/2020

APPEAL STAFF REPORT: DE NOVO HEARING

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

Applicant: Shear Development Co., LLC

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

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

Staff Recommendation: Denial

SUMMARY OF STAFF RECOMMENDATION

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

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Program (LCP) provisions. Specifically, the Commission found that the project was inconsistent with water supply and wastewater provisions, including those that require denial of projects where adequate water and wastewater supply are not available, and that the project was inconsistent with the LCP's environmentally sensitive habitat (ESHA) provisions, which only allow uses dependent on the resource within such habitat areas, and only when such allowable uses are sited and designed in a manner that does not significantly disrupt habitat values. The Commission also found that the entire Los Osos community (including the project site) likely constitutes ESHA due to much of the area being critical habitat for the federally endangered Morro shoulderband snail.

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

Special Condition 6 prohibits wastewater service to undeveloped properties within the service area, such as those that are the subject of this application, unless and until the LCP is amended to identify appropriate and sustainable buildout limits. Although the County is working on an update to the LCP's Los Osos Community Plan to this end, at this time the LCP has not been amended to establish sustainable buildout in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect. Due to this prohibition, and a RWQCB prohibition on using a septic system, there is no wastewater service available to serve the approved project and the LCP therefore requires denial of the proposed development. Moreover, the County has not yet developed an approved groundwater basin management plan to monitor water supply and manage extractions sustainably, also required to be a part of the Community Plan update. Development of such a plan is a critical aspect of the LCP update and is required to lift the sewer connection prohibition of Special Condition 6. Thus, there is inadequate evidence to support a determination that adequate water or wastewater services exist to serve the development as required by the LCP, and the County is in fact prohibited from providing

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sewer service to this property by CDPs A-3-SLO-09-055/069. Thus, the LCP requires denial of this proposed project due to lack of water and wastewater services.¹

Additionally, all of Los Osos is located atop an ancient dune system and the entire community has in the past been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail. This project is located at the periphery of a more developed area in an area mapped by the LCP as ESHA, where the biological report for the project demonstrates that the sites are ESHA, and where USFWS concurs that the sites are habitat for the shoulderband snail. The proposed residential development is not a resource-dependent use, and is thus prohibited in ESHA by ESHA Policy 1, requiring denial. Further, the proposed residential development only serves to fragment ESHA that is not directly removed (by residence and related development, including both hardscape and landscaping – at least over half an acre directly removed), and includes no setbacks or other mitigation measures to address adjacency issues for the ESHA that would remain, and thus does not demonstrate no significant impact to ESHA. The proposed development is thus also inconsistent with ESHA Policy 2, also requiring denial. Even if the proposed development met those ESHA tests, which it does not, mitigation for impacts would be required by ESHA Policies 2 and 6. The proposed development includes no such mitigation, also calling for denial under the LCP.

Further, the County is currently in the midst of finalizing a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable programmatic mitigation options for potential development to offset impacts. Although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, which is envisioned as part of the in-process Los Osos Community Plan. In short, the proposed project is inconsistent with the LCP's ESHA provisions, also requiring denial.

Finally, when the Commission denies CDPs for proposed development, the Commission must also evaluate whether that decision might constitute a taking of private property without just compensation. As further detailed in this report, staff does not believe that denial here would constitute a takings, primarily because such a takings claim is not ripe, including because applicable case law indicates that the *de facto* moratorium on new development on undeveloped properties in Los Osos at this time is temporary in nature and caused by the factual circumstance of insufficient public

¹ The Applicant argues that because sewer laterals to the properties were apparently installed prior to the approval of the LOWWP, development of residences on the subject properties were in some way accounted for and must be allowed. The Commission *did not approve* the installation of any sewer laterals onto the subject lots as the Applicant asserts and in fact the Commission's enforcement unit is investigating this as a violation. Consistent with advice from both the State Attorney General and the Coastal Commission Chief Counsel (see memos dated June 20, 2014, and August 1, 2014, respectfully), Commissioners should not engage in any ex parte communications related to these potential violations.

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services in Los Osos, rather than any prohibition on development inherent in the applicable LCP provisions themselves.

Staff therefore recommends that the Commission deny a CDP for the proposed project. The motion is found on page 6 below.

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APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – Proposed Project Plans

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

Exhibit 5 – Commission Staff Letters Regarding Special Condition 6

Exhibit 6 – Applicable LCP Provisions

Exhibit 7 – United States Fish and Wildlife Service Letter Dated February 11, 2010

CORRESPONDENCE

EX PARTE COMMUNICATIONS

I. MOTION AND RESOLUTION

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

Motion: I move that the Commission approve Coastal Development Permit Number A-3-SLO-19-0180 for the development proposed by the applicant, and I recommend a no vote.

Resolution to Deny CDP: The Commission hereby denies Coastal Development Permit Number A-3-SLO-19-0180 on the grounds that the development will not be in conformity with the San Luis Obispo County Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.

II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. PROJECT LOCATION

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

The project site consists of three noncontiguous undeveloped parcels. All three parcels are relatively flat with terracing along the perimeters. The lots are described as consisting of Baywood fine sandy soil with slopes ranging from 2 to 9 percent. The sites are covered primarily with nonnative grasses and coast live oak, Monterey cypress, and eucalyptus trees along their perimeters. The eastern portion of the lot at 294 Mar Vista includes a more heavily vegetated area where stormwater accumulates. The lot at 282 Mar Vista includes an unpermitted rudimentary volleyball court in the middle of the lot.

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The parcels are zoned residential single family, which allows for one residence per legal parcel.

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

B. PROJECT DESCRIPTION AND HISTORY

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

The three lots currently proposed for development were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved physical development of four of the residential units on four other lots, but explicitly chose not to approve physical development of residential units on the remaining four vacant lots, three of which are the subject of the current proposal. At that time the Commission found that there was too much uncertainty regarding wastewater service in Los Osos, and that it was inappropriate to allow actual buildout of the lots subject to this application unless and until a new community wastewater treatment system could be developed and these lots could be served by it. Although a new wastewater treatment system, the Los Osos Wastewater Project (LOWWP), has been developed, it cannot serve the three subject lots by the terms and conditions of the LOWWP permit (CDPs A-3-SLO-09-055/069), specifically Special Condition 6. The Commission at that time also required that any physical development on the remaining four lots, three of which are the subject of the current proposal, would require future separate CDPs.

On December 15, 2017, the San Luis Obispo County Planning Department Hearing Officer denied the proposed project (County CDP Application No. DRC2017-00029) based on inconsistencies with County LCP provisions for protection of water quality and groundwater resources. The Applicant appealed the Planning Department's denial to the County's Board of Supervisors and on July 16, 2019 the Board ultimately approved a CDP for the proposed project by a vote of 3-2. The County's approval was subsequently appealed to the Commission. On October 18, 2019, the Commission found that the County's approval of the project raised a substantial issue with numerous San Luis Obispo County LCP provisions related to water supply, wastewater, and environmentally sensitive habitat (ESHA).

C. COASTAL DEVELOPMENT PERMIT DETERMINATION

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

1. Public Services

Applicable LCP Provisions and Los Osos Public Services Background

The San Luis Obispo County LCP is divided geographically into four areas,² each with its own LCP area plan. The LCP also includes a Land Use Plan titled the “Coastal Zone Framework,” and an Implementation Plan titled the “Coastal Zone Land Use Ordinance” (CZLUO), which are both applicable throughout all four LCP areas. The subject properties are located within the area governed by the LCP’s Estero Area Plan (EAP).

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

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

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

² The County’s four areas are: North Coast, Estero, San Luis Bay, and South County.

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

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

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

Although the Commission recognized the immediate need for the LOWWP to resolve issues of groundwater contamination caused by the existing individual septic systems,

³ Due to the manner in which the County acted on the CDP for the LOWWP (an overall approval action followed by an amendment action to modify a portion of the project), there are two Coastal Commission permit numbers associated with the project.

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

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

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

Thus, unless and until the EAP is amended to identify sustainable buildout limits, including in terms of water usage/supply and ESHA considerations, the LOWWP is *prohibited* from serving undeveloped properties within Los Osos, including the three properties that are the subject of this application. Although the County has made significant progress in developing a Los Osos Community Plan,⁴ the LCP has yet to be amended to establish sustainable buildout in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to new development on undeveloped lots is still in effect.⁵

⁴ The County published a Draft Environmental Impact Report for the Community Plan on September 12, 2019 and intends to bring the plan forward for Board of Supervisors and Coastal Commission approval this year.

⁵ The Coastal Commission has previously approved amendments to CDPs A-3-SLO-09-055/069 to allow for expansions of the service area of the LOWWP in order to serve *already developed properties* so as to better protect coastal resources, such as in June 2016 to allow the Monarch Grove area to be added to

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The County has previously recognized that wastewater service to undeveloped parcels is currently prohibited, including through informational brochures that are distributed to Los Osos property owners (see **Exhibit 4**) and a prior denial of new sewer connections to undeveloped properties.⁶ Additionally, Commission staff has repeatedly informed the County and property owners of the prohibition (see **Exhibit 5**), including to explain that Special Condition 6 prohibits any expansion of wastewater service to facilitate increased growth and development in the community, including new connections to undeveloped properties, until appropriate sustainable buildout limits are identified through the updated Los Osos Community Plan through an LCP amendment that address water, wastewater, and ESHA, including a required HCP component. The prohibition on new wastewater service, therefore, is not only applied to clearly applicable cases that involve new development on completely vacant parcels, such as the case here, but the prohibition must also apply to projects that include significant intensifications of use, significant expansions on already developed properties, or where the property owners previously purchased wastewater or water saving credits.⁷

Analysis

The proposed project includes the construction of three new residences on three undeveloped parcels within Los Osos. The new residential structures would be served by the LOWWP, which is prohibited from serving undeveloped parcels due to Special Condition 6 of CDPs A-3-SLO-09-055/069. As explained above, CZLUO Section 23.04.430 (**Exhibit 6**) states that a “permit for new development that requires water or disposal of sewage shall not be approved unless the applicable approval body determines that there is adequate water and sewage disposal capacity available to serve the proposed development.” In other words, under the LCP, lack of either water availability or sewage disposal is grounds for denial of a project. Thus, in order to

the service area to avoid continued use of the area’s failing wastewater treatment package plant. Such an amendment is consistent with the intent of the CDP and Special Condition 6 because the amendment provided for an immediate solution to the community’s wastewater service issues with regard to *existing development* while not facilitating increased, growth-inducing development until the EAP is updated.

⁶ See, for example, County CDP Application DRC2015-00092 (Now SFD), denied by the County on September 2, 2016.

⁷ Los Osos residents have previously inquired whether properties that have secured wastewater or water saving credits (otherwise known as “Title 19 Retrofit Certificates”) could be developed prior to the required Los Osos Community Plan LCP update. In terms of wastewater credits, the RWQCB has indicated that any credits available from past actions were intended for properties that were already eligible to connect to the sewer. For example, if someone has a property that is eligible to connect to the community sewer system and wants to build prior to being hooked up to the sewer, then that person could utilize a credit to install a temporary septic system. However, as detailed above, only already-developed properties are eligible for sewer connections at this time and thus those properties would not need to utilize a previously secured temporary septic credit for this purpose. In terms of water saving certificates, these certificates alone do not entitle an applicant to development now. Although these water conservation certificates were previously issued to properties in the septic prohibition zone, the certificate does not guarantee the right to develop parcels upon completion of the sewer, but rather once the parcel is eligible to connect to the future sewer system. As described above, the key threshold before wastewater service can be provided to any undeveloped property is certification of an updated LCP Los Osos Community Plan in the Estero Area Plan by the Coastal Commission.

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approve the project, the Commission must find that there is adequate water and sewage disposal capacity to serve any proposed development prior to approval.

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

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

The Applicant also suggests that because sewer laterals to the property were apparently installed prior to the approval of the LOWWP, development of residences on the subject properties were in some way accounted for in the approval of the LOWWP and connection to the sewer system must be allowed. However, in the Commission's 2004 approval of the subdivision that created the subject lots,⁸ the Commission

⁸ Again, these three lots were the subject of a larger proposed eight-unit subdivision and residential development that was appealed to the Commission in 2004 (A-3-SLO-04-019). In that case, the Commission approved physical development/buildout of four residential units on four other lots, but explicitly chose *not* to approve physical development/buildout of the then-proposed four residential units

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specifically *rejected* proposed future speculative physical development/buildout of the lots at issue in this application due to the uncertainty regarding any future community sewer system. The Commission at the time found that there was too much uncertainty regarding wastewater service in Los Osos, and that it was inappropriate to allow development of these lots (i.e., those subject to this application) unless and until a new community wastewater treatment system could be developed (which it has, the LOWWP) and these lots could be served by it (which they cannot by the terms and conditions applicable to the LOWWP). Nothing in the record of the Commission's LOWWP approval suggests that the subject lots, or any other undeveloped lots, would be exempt from Special Condition 6's prohibition on connections to undeveloped properties. Further, installation of sewer laterals likely would not have taken place at the time of the Commission's approval, or even been contemplated by the Commission, because there was no community wastewater system in place for the lots to connect at that time. The four houses approved at that time were developed with septic. If sewer laterals were installed at any time subsequent to the approval, as alleged by the Applicant, then such sewer laterals were installed without benefit of a CDP and constitute a violation.⁹

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

Moreover, the Commission *did not approve* the installation of any sewer laterals or sidewalks or any other development onto the subject lots as the Applicant asserts. In fact, Special Condition 2 of the Commission's approval of CDP A-3-SLO-04-019, which approved the underlying subdivision that created the subject lots, required that the then applicant record a scenic easement over the undeveloped lots at issue here. That scenic easement prohibited the installation of any "building, structure, or other improvements" on the properties. Typically, any subdivision infrastructure would normally be constructed within a road right-of-way, not within the lots themselves, and the Commission's approval of the subdivision does not provide evidence that the

on the remaining four vacant lots, three of which are the lots that are the subject of this current application.

⁹ The Commission's enforcement unit is investigating the Applicant's assertions as a potential CDP violation.

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Commission acquiesced to such infrastructure being developed on the lots themselves, as demonstrated by the scenic easement requirement. Any such sewer lateral, sidewalk, or any other development that may have taken place on the properties subsequent to approval of CDPs A-3-SLO-04-019 is not consistent with the terms of the recorded scenic easement that was required under this CDP, was not permitted under the Commission's approval, and would represent a violation. And any related assertions that the Commission somehow intended to, or did, approve this project via its 2004 approval of the subdivision, or somehow obligated a future Commission to approve it, or somehow contemplated serving this project through its 2010 CDP for the LOWWP, are simply inaccurate.

Moreover, as reflected in the Commission's approval of the LOWWP, including inclusion of Special Condition 6, the purpose of the limitation of Special Condition 6 with respect to new connections is clear, and the "anticipatory" water and sewer mains and laterals referenced by the Applicant (again, for which there was no authorization to put said improvements in place) cannot be understood as rendering the parcels here "developed" for purposes of avoiding application of Special Condition 6. To the contrary, the whole purpose of Special Condition 6 was to allow for the proper buildout planning associated with Los Osos to be accomplished through an LCP amendment and an HCP. Such an LCP amendment will need to set specific standards for future sustainable and appropriate infill and other development in Los Osos in relation to not only limited water supplies and wastewater services, but also their connection to sensitive species and other habitat protection, and the ways they affect the adjacent Morro Bay estuary and its related groundwater and other resources. That planning is in progress, but not yet complete. Considering this context, approval of this project at this time is premature.

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

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(or its equivalent) is developed to ensure there is adequate water to serve the proposed development.¹⁰

2. Environmentally Sensitive Habitat (ESHA)

Applicable LCP Provisions and ESHA Background

The LCP includes a robust policy framework to prevent adverse impacts to ESHA. LCP ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. LCP ESHA Policy 2 requires development in or near ESHA to “demonstrate that there will be no significant impact on sensitive habitats” and provide: “a) the maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures” as a condition of approval. Because significant ESHA resources are known to occur within the County’s urban areas, such as Los Osos, LCP ESHA Policy 6 requires the County to create an off-site mitigation program in order to allow for development in urban areas that may not serve as long-term viable habitat in consideration of permanent protection of off-site ESHA. In this case, and in addition to it being required by the Commission’s LOWWP CDP, the County is developing an HCP as part of the required LCP Los Osos Community Plan Update for that reason as well. See **Exhibit 6** for all the LCP ESHA provisions cited in this section.

With respect to wetlands and riparian areas, LCP Coastal Watersheds Policy 1 provides that the “long-term integrity of groundwater basins within the coastal zone shall be protected.” In addition, LCP Coastal Watershed Policy 2 states that “[g]roundwater levels and surface flows shall be maintained to ensure the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organisms, and for the protection of human health.” LCP ESHA Policy 7 adds: “Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored.” LCP ESHA Policy 20 provides: “Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological system and ecological function of coastal streams shall be protected and preserved.” And LCP CZLUO Section 23.04.430, in conjunction with these LCP coastal resource policies, demonstrates the strong emphasis that the LCP places on ensuring that instream flows are adequate to protect groundwater aquifers, wetlands, and sensitive riparian habitats.

Los Osos is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known and recognized as one of the most important biologic and wetland resources in California’s coastal zone. The Morro Bay watershed stretches inland to the foothills of the Santa Lucia Range, and a variety of

¹⁰ And again, the Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood “adequate” public services in relation to water and wastewater to mean that a sustainable water supply and adequate wastewater capacity exist to accommodate new development in a manner that will not lead to adverse coastal resource impacts. See, for example, A-3-SLO-03-117 (Brown/Townsend); A-3-SLO-09-032 and A-3-SLO-09-033 (Kolb and Cefalu CCOCs); A-3-SLO-11-055 (Kellaway); and A-3-SLO-19-0199 (Hadian SFD).

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coastal creeks and tributaries (including Los Osos, Warden, Chorro, and Morro Creeks) wend their way from the hills down through Los Osos and to Morro Bay, forming the area's ESHA mosaic.

In addition, the LCP EAP designates and provides maps of several unique Sensitive Resource Areas (SRAs) within this planning area, some which are designated as terrestrial ESHA because of their high environmental quality and special ecological or educational significance. Most of the Los Osos built environment has been constructed on ancient dunes formed by centuries of wind-blown beach sand that was deposited along the south end of Morro Bay. As a result, the terrain of Los Osos consists of gently rolling hills and sandy soils, often referred to as "Baywood fines." The sandy soils and marine climate combine to produce a unique coastal ecosystem that is home to a wide array of plant and animal species, some of which are found nowhere else in the world. As such, the EAP designates this unique habitat as the "Los Osos Dunes Sand SRA" and recognizes that areas underlain by these types of soils are "included in the Sensitive Resource Area combining designation and are also an Environmentally Sensitive Habitat."

Analysis

The EAP states that all of Los Osos has previously been found to contain Baywood fines soils and describes the general location of the Los Osos Dune Sands SRA as "the southern shore of the Morro Bay estuary, extending to the southern slopes of the first range of the Irish Hills and to Los Osos Creek." The EAP also includes a map of the Los Osos Dune Sands SRA (Figure 6-3, shown below), which encompasses all of the urban areas of Los Osos, with the proposed project site noted by a red dot.¹¹

¹¹ The Applicant argues that the site is not ESHA because it was not identified as such in the 2019 Draft Environmental Impact Report (DEIR) that was recently published for the Los Osos Community Plan Update. However, not only is the 2019 DEIR not yet adopted by the County and not part of the LCP, the Applicant misstates the identified DEIR map's intention. Specifically, a primary objective for the community plan update and its accompanying HCP is to recognize that most all of Los Osos is ESHA (including the project site) and to provide a means to account for potential in-fill development in these ESHA areas. The DEIR map in question was County staff's first attempt at identifying this potential infill ESHA area, to which HCP mitigations would apply. In doing so, their first attempt called this area out as "non-ESHA" as a means of identifying this area for potential ESHA infill processing, because otherwise the intended infill development could not proceed under the current LCP's ESHA policies. While intended for these infill objectives associated with the community plan, the terminology is inartful and will need to be modified to also identify this area as ESHA (as the LCP does currently) to which certain infill allowances, subject to the HCP, may be allowed. When read together with the draft HCP, the two documents clearly demonstrate that all of Los Osos supports habitat for rare and valuable species and thus qualifies as ESHA. Ironically, the Applicant suggests that utilizing the draft HCP as a basis to conclude that the project is ESHA would be unconstitutional because it has not yet been adopted, yet the Applicant urges the Commission instead to rely on the unadopted and uncertified DEIR to reach the opposite conclusion. While both documents provide helpful context that plainly show that multiple agencies recognize the unique and valuable habitat located within Los Osos, neither document is being used as the standard of review. Rather, the entire project site is already designated and mapped as ESHA in the existing LCP, which is the only standard of review being utilized for this project.

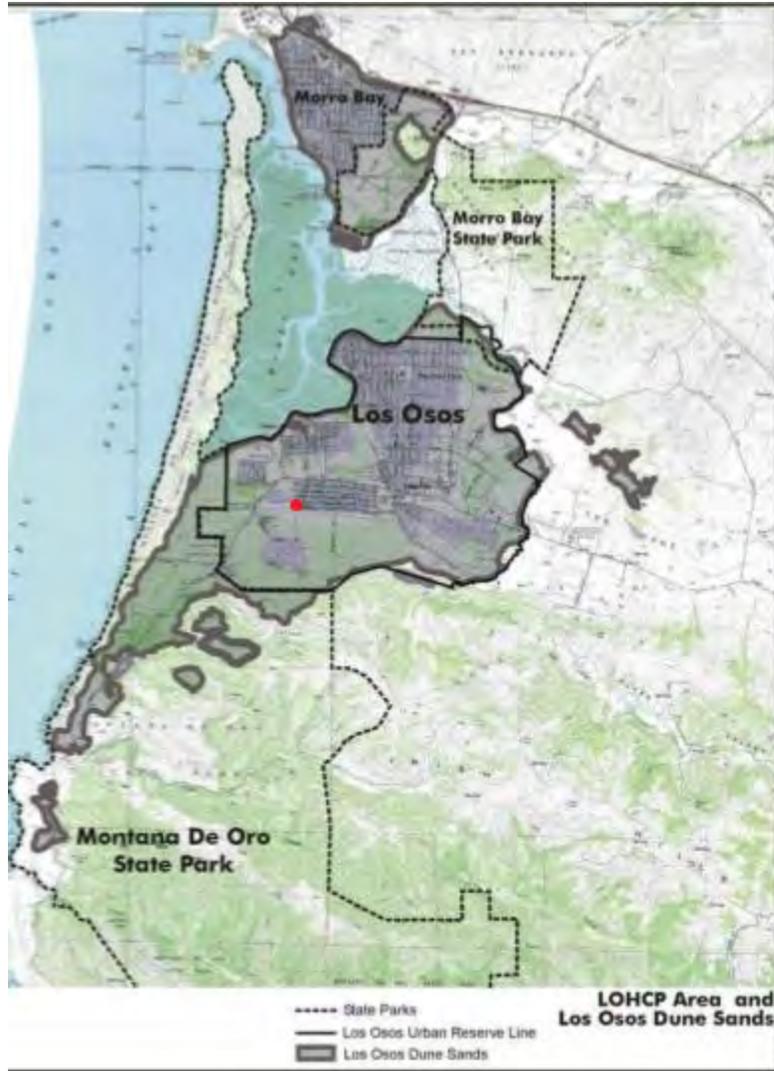


Figure 1. LCP EAP Figure 6.3 (Los Osos HCP Area and Los Osos Dune Sands)

Since nearly all the urban area of Los Osos is underlain by this same sandy soil that supports ESHA and/or ESHA seed bank, which is mapped as an SRA (LCP EAP Figure 6.3) and designated as ESHA in the LCP, there is a rebuttable presumption that all of the undeveloped land within this area, including remaining vacant parcels such as the parcels at issue here, constitute ESHA under the LCP.¹² LCP EAP Figure 6.3 requires

¹² The Applicant argues that the only maps that can designate SRAs are the combining designation maps in the Land Use Element (LUE) and states that the LUE Combining Designation Map does not identify the urban area of Los Osos as an SRA. The map referenced by the Applicant, however, is not the only LCP map that designates SRA combining designations and the existence of ESHA in Los Osos. In fact, the EAP dedicates an entire chapter of the plan to the “Combining and Other Designations” that identify the “[s]ensitive, scenic and other special features of the environment” in the Estero area. Section III of that chapter states that “the following areas are subject to special combining designations” and goes on to describe the Los Osos Dunes Sands SRA and includes the map shown above. The Applicant’s interpretation (i.e., that the EAP cannot designate SRA combining designations), would render the entire combining designation chapter of the EAP completely meaningless. Moreover, the LCP’s Land Use

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as much. In fact, the entire community has in the past been recognized as ESHA by the Commission, including due to much of it being critical habitat for the federally endangered Morro shoulderband snail.¹³

Moreover, the LCP's definition of ESHA includes any area that supports plant or animal life, or their habitats, that are either rare or especially valuable, even if that area is not mapped as ESHA in the LCP. As noted above, all of Los Osos has been previously recognized by the Commission as ESHA and is specifically designated in the LCP as ESHA because it is underlain with sandy soil that supports rare and unique species that are found nowhere else in the world, including sensitive species such as the Morro shoulderband snail, regardless of whether the area is mapped as ESHA on LCP EAP Figure 6-3. The biological report that was completed for this project states that the subject properties are underlain by the globally rare Baywood fines soils, which is known to support rare and unique species. Thus, the entire project site constitutes ESHA, not only because it is mapped on Figure 6-3 as part of the Los Osos Dunes Sands SRA in the LCP, but because the site-specific resources demonstrate that the project site consists of a specific type of sandy soil that supports rare and valuable plant and animal life.

The Applicant also argues that the project site does not constitute ESHA because the project site is disturbed and no Morro shoulderband snails or shells were observed on these particular lots during field surveys. However, the LCP definition of ESHA includes any area that *supports habitat* for rare and valuable plant or animal life, not just areas that contain individual specimens of sensitive species. The biological reports confirm that the project sites contain Baywood fine soils, which have consistently been found in nearby restoration projects and field surveys to provide conducive habitat for Morro shoulderband snails. In fact, individual snails have been on similarly situated lots 0.22 miles away from the proposed project. USFWS submitted correspondence on this project (see **Exhibit 7**), stating that "the parcels likely support the federally endangered Morro shoulderband snail (*Helminthoglypta walkeriana*) and project activities may result in the permanent loss of Morro shoulderband snail habitat." The letter states that the project site consists of viable habitat because the site contains Baywood fine soils and evidence demonstrates that the species can occur even in "areas that are highly disturbed." Thus, and irrespective of the maps or past Commission observations which also find the sites to be ESHA, site-specific evaluation, including from the resource experts for such species at USFWS, indicates that the project site provides habitat for rare and valuable species, including an endangered species, and therefore

Plan's "Framework for Planning" explicitly states that a planning area standard (here, the EAP) will take precedence over a policy or ordinance standard (in this case, as alleged by the Applicant, the LUE Combining Designation Map) in cases where there may be internal LCP inconsistencies or conflicts. Thus, the EAP SRA combining designations, including EAP Figure 6.3 (Los Osos Dune Sands SRA) shown as Figure 1 above, would take precedence over any less specific maps, including the LUE map cited by the Applicant.

¹³ See, for example, A-3-SLO-98-061 (Wolcott Residences); A-3-SLO-98-087 (Cabrillo Associates); SLO-MAJ-2-04 Part 2 (Estero Area Plan Update); A-3-SLO-09-055/069 (Los Osos Wastewater Project); and A-3-SLO-11-055 (Kellaway).

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independently constitutes ESHA for these reasons as well, regardless of whether the sites are disturbed and regardless of whether the site is mapped as ESHA, which it is.

The proposed project includes the construction of three new residences on undeveloped parcels within Los Osos that, as explained above, constitute ESHA. The Applicant has not proposed any mitigation for the permanent loss of habitat that would be caused by the project. Ultimately, the project would include 24,742 square feet, or over a half-acre, of building and pavement coverage among the three parcels (and additional areas of landscaping that would also directly remove ESHA). Thus, the proposed project would lead to the permanent loss of at least over a half-acre of ESHA (which has been confirmed by USFWS (see **Exhibit 7**)), impact adjacent ESHA, and have temporary construction-related impacts.

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

The proposed residential development is not a resource-dependent use, and is thus prohibited in ESHA by ESHA Policy 1, requiring denial. Further, the proposed residential development only serves to fragment ESHA that is not directly removed (by residence and related development, including both hardscape and landscaping), and includes no setbacks or other mitigation measures to address adjacency issues for the ESHA that would remain, and thus does not demonstrate no significant impact to ESHA. The proposed development is thus also inconsistent with ESHA Policy 2, also requiring denial. Even if the proposed development met those ESHA tests, which it does not, mitigation for impacts would be required by ESHA Policies 2 and 6. The proposed development includes no such mitigation, also calling for denial under the LCP.

Further, as discussed in the “Public Services” section above, the County is currently in the midst of creating a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impact of that development through the LCP’s Los Osos Community Plan update. However, although the County is actively working on it, the HCP has not yet been completed, its prescriptions for development versus non-development areas have not been identified, its mitigation program has not been developed and, as a result, its provisions have not been made part of the LCP, as is envisioned to occur as part of the Los Osos Community Plan in process and LCP ESHA Policy 6. Until the HCP (or an equally protective alternative) is complete and the program is incorporated into the LCP via the Los Osos Community Plan, even if the

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proposed project met other ESHA tests, which it does not, individual project-level mitigation may not adequately offset potential ESHA impacts as required.

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

In short, the proposed project site is ESHA where residential development is prohibited. Even if it were allowable here, which it isn't, the project would also adversely affect any remaining ESHA not directly removed, which is also inconsistent with the LCP. Including in relation to the potential effect of the proposed project water supply on groundwater and coastal watersheds. And even if the project were to somehow meet those ESHA tests, which it cannot, it doesn't include any mitigation for ESHA impacts, and can't provide ESHA mitigation through a programmatic methodology as directed by the LCP because none yet exists. Thus, the proposed project is inconsistent with the LCP's ESHA provisions, and requires denial.

3. LCP Consistency Conclusion

As discussed above, the proposed project is inconsistent with the LCP's provisions that require new development to ensure that adequate water and wastewater capacity is available to serve the project, and with LCP ESHA provisions. Thus, the project must be denied at this time. Typically, the proposed project would need to be evaluated for consistency with other LCP policies and standards related to visual resources, archaeology and cultural resources, hydrology and water quality, parking and traffic, and land use and zoning. However, because the project is being denied due to substantial inconsistency with the LCP's groundwater resources, water supply, and ESHA provisions, these issues are not evaluated in this de novo review.

4. Takings

In addition to evaluating the proposed development for consistency with the certified LCP, the Commission must also evaluate the effect of a denial action with respect to takings jurisprudence. In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation. To avoid an unconstitutional

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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.

Similarly, Goal 9 of the San Luis Obispo County LCP Framework for Planning states the LCP is intended to recognize and protect private property rights by not taking private property without just compensation.

Although the judiciary is 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/LCP 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 Applicant's proposed residential development could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not constitute a taking because such a 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."¹⁴ Similarly, Article 1, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner." Despite the slightly different wordings, the two "takings clauses" are construed congruently in California, and California courts have analyzed takings claims under decisions of both state and federal courts (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664). The "damaging private property" clause in the California Constitution is not relevant to the

¹⁴ 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).

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current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The United States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 (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, 522–23). 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 522–23). 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, 488–89, 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 1017–18 (*emphasis* in original); *Riverside Bayview Homes* (1985) 474 U.S. 121, 126 (regulatory takings occur only under “extreme circumstances”¹⁵).

In order to determine if a regular taking has occurred under the second circumstance, courts apply the multi-part, *ad hoc* test identified in *Penn Central Transportation Co. 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*, the Court

¹⁵ 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*, 505 U.S. at 1029).

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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. ((2003) 533 U.S. 606, 617, 632 (finding that the *Lucas* categorical test where property retained value following regulation did not constitute a taking 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 precedent, 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) (internal quotation marks omitted). Furthermore, the Ninth Circuit has suggested that rejection of a sufficient number of reapplications may be necessary to trigger the futility exception (*Id.* at 1454-55).

Denial of the Proposed Project Would Not Result in a Regulatory Taking

As analyzed above, application of LCP Public Policy 1 and CZLUO Section 23.04.430 require denial of the proposed development at this time on the grounds that Los Osos lacks sufficient public services to serve the project. Thus, it could be argued that the regulation results in an unconstitutional taking of the Applicant’s private property. However, based on the law and facts analyzed below, it is unlikely that such a temporary denial of development on these facts would constitute an unconstitutional taking in this case.

At this time, application of LCP Public Policy 1 and CZLUO Section 23.04.430 (in further consideration of special condition 6 of the LOWWP CDP) has the effect of a moratorium on new development on undeveloped properties in Los Osos that requires water and wastewater service. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory takings (*Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302). In *Tahoe-Sierra*, the Court reasoned that, “[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted” (*Id.* at 332). The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy (*Id.* at 337). “In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development” (*Id.* at 337-38).

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

This position is also consistent with the reasoning in the published Pratt case (*Charles A. Pratt Construction Co., Inc., v. California Coastal Commission*, (2008) 162 Cal. App. 4th 1068 by the California Court of Appeal for the Fourth District). In *Pratt*, the appellant-applicant argued that the Coastal Commission's decision to deny a CDP based on lack of water, due to the requirements of LCP Public Policy 1 and CZLUO Section 23.04.430 was an unconstitutional taking. The Court of Appeal ruled against the appellant-applicant and upheld the Commission's denial of the CDP, finding that denial was not an unconstitutional taking. It stated that the appellant-applicant failed to cite any authority that: (1) denial of a development permit because of insufficient water supply constitutes a taking; or (2) that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, "Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm" (*Id.* at 1081). The court also found that an "intent-to-serve letter" from a community water supplier did not change the result because there is no rule that the water company's determination is definitive (*Id.* at 1082). "It is undisputed," the court continued, "that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft" (*Id.*). The court further reasoned that the appellant-applicant failed to demonstrate with sufficient certainty that his development would have adequate supply of water (*Id.*). The material facts in this application are analogous to those in *Pratt*. Both involve denial of a CDP application pursuant to LCP Public Policy 1 and CZLUO Section 23.04.430's requirement that a proposed project demonstrate that it has access to an adequate water supply. Neither the applicant at issue here, nor the applicant in *Pratt* could do so. As the *Pratt* court held, denial on this basis does not constitute a taking because it is the lack of public services (water availability and wastewater service) in Los Osos, not the regulation, that has temporarily delayed the either applicant's ability to develop their sites.

Given the precedent set in *Pratt*, it is unlikely that the Commission's decision to deny the proposed development, on the grounds that it is inconsistent with LCP Public Policy 1 and CZLUO Section 23.04.430, would result in an unconstitutional taking. Although the regulation's effect is a *de facto* moratorium on new development on undeveloped

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properties in Los Osos at this time, this effect is temporary in nature and caused by the factual circumstance of insufficient public services in Los Osos, rather than any prohibition on development inherent in the regulation itself.

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

Though denial of the proposed development is presently justified on the basis of inconsistency with LCP ESHA policies, if in the future factual circumstances change such that the proposed development can be found to be served by adequate public services as required by the LCP, the LCP ESHA issue will need to be evaluated at that time in light of the LCP. In that regard, the Commission's certification of a Los Osos Community Plan update that defines buildout for the community based on the availability of water and wastewater service is also required to include an HCP that provides a regional and programmatic approach for addressing the fact that all of Los Osos has been called out as ESHA. It is not yet clear how that update will address ESHA, including areas allowed to develop notwithstanding ESHA conditions versus not, and required mitigations where such development is allowed. So it is also premature to find a taking based on the project denial for ESHA reasons.

In fact, once the properties are properly identified as ESHA and evaluated consistent with LCP requirements, as contemplated to be updated through the LCP via establishment of the HCP, it may be that the project is not inconsistent with LCP ESHA provisions. Even if it is determined that the proposed project would be inconsistent with ESHA provisions, the project may be able to be revised and approved in a manner which avoids LCP ESHA inconsistencies. Or, if such inconsistency is unavoidable, the Commission may approve the minimum amount of development necessary to avoid an unconstitutional taking of private property, despite the LCP ESHA inconsistency. Given these various potential outcomes, all of which would avoid the outcome of an unconstitutional taking of private property, it would be premature at this time to assert that denial of the proposed development on the basis of LCP ESHA provisions results in a taking.

D. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

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

CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.
[Relevant Portion.] A public agency may disapprove a project if necessary in

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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.

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APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- Application File A-3-SLO-19-0180
- *Morro Shoulderband Snail Habitat Assessment and Protocol Survey Report for the Shear Development MUP DRC2017-00029, Lots 1, 3, 5, and 7 of Tract 2161, Los Osos, San Luis Obispo County, California.* Ecological Assets Management, LLC. March 14, 2019.

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- San Luis Obispo County Planning Department
- United States Fish and Wildlife Service
- Oasis Associates, Inc.