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STAFF REPORT SUBSTANTIAL ISSUE & CDP DETERMINATIONS

Appeal Number: A-3-SLO-21-0065

Applicant: Ralph Bookout

Appellants: Commissioners Escalante and Hart, Elizabeth Bettenhausen, Christine Heinrichs, and Ted Key

Local Government: San Luis Obispo County

Local Decision: County coastal development permit number DRC2019-00214 approved by the San Luis Obispo County Board of Supervisors on September 14, 2021.

Project Location: Vacant, undeveloped, rural and nearly 7-acre property outside the main developed area of the unincorporated community of Cambria in San Luis Obispo County (at 6725 Cambria Pines Road; APN 013-085-005).

Project Description: Construction of a 3,136 square-foot single family residence, 1,000-square-foot garage, 1,000-square-foot workshop, 72-square-foot attached storage, and 32-square-foot yard-shed, and related residential development (including grading and removal of some 70 Monterey pine trees).

Staff Recommendation: Substantial Issue Exists; Denial

IMPORTANT HEARING PROCEDURE NOTE

Please note that at the hearing for this item the Commission will not take testimony on staff's substantial issue recommendation unless at least three Commissioners request it. Commissioners may ask questions of the Applicant, aggrieved persons (i.e., generally persons who participated in some way in the local permitting process), the

Attorney General, the Executive Director, and their proxies/representatives prior to determining whether or not to take such testimony. If the Commission does decide to take such testimony, then it is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits). Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application, and it will then review that application immediately following that determination (unless the de novo portion of the hearing has been postponed), at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

San Luis Obispo County approved a coastal development permit (CDP) for the construction of a 3,136 square-foot single family residence, 1,000-square-foot garage, 1,000-square-foot workshop, 72-square-foot attached storage, and 32-square-foot attached yard-shed, and related residential development (including grading and removal of some 70 Monterey pine trees) on a vacant, undeveloped, rural 6.64-acre parcel outside of the community of Cambria in unincorporated San Luis Obispo County. The Appellants contend that the County's action is inconsistent with numerous policies and standards in the County's certified Local Coastal Program (LCP), including primarily those related to water supply and sensitive habitats. Following review of the local record, staff recommends that the Commission find that the County's approval of the project raises a substantial LCP conformance issue and that the Commission take jurisdiction over the CDP application, and on de novo review, deny the CDP.

The County's action raises substantial LCP water resource and sensitive habitat issues because: (1) the County did not determine that there was an adequate sustainable water supply to serve the project as is required by the LCP, but rather relied solely on a Cambria Community Services District (CCSD) intent-to-serve (or "will serve") letter and participation in CCSD's retrofit program for this purpose; (2) there is not an adequate sustainable water supply to serve new development in Cambria (and it is not adequate even for existing development) with or without the CCSD will-serve/retrofit participation, a factual finding that has been repeatedly determined by the Commission in relation to development in the Cambria area through multiple actions, including certification of LCP policies (specific to the lack of available water and imposing specific water supply requirements) and CDP actions; (3) the sources of Cambria's water supply (i.e., Santa Rosa and San Simeon Creeks) are LCP-designated environmentally sensitive habitat areas (ESHAs) that are currently being adversely affected by existing water extractions to support even existing development in Cambria, let alone new development such as this;¹ (4) the County found that the project could be served by the community's already

¹ Note that CCSD is currently in violation of its Coastal Commission CDP that authorizes such creek withdrawals in the first place because that CDP approval was contingent on terms and conditions that

oversubscribed water supply because the project represented a pre-2001 (i.e., the year that CCSD imposed a water use moratorium) CCSD water service commitment,² but the LCP only allows use of such water if it is from an adequate sustainable water supply, which it is not, and the LCP provisions cited by the County to justify its approval were both mischaracterized and are not applicable to this project in the first place; (5) the project would be required to comply with the CCSD's retrofit program designed to offset water use, but such offsets would be inadequate to meet LCP standards with respect to adequate water supply and the CCSD's program does not appear to actually offset such water use even if it were to be deemed an appropriate tool to meet LCP standards, which it is not; and 6) the County's approval would authorize extensive residential development within native Monterey pine forest, including removal of some 70 Monterey pine trees and nearly an acre of forest overall, which the LCP designates as ESHA and within which residential development is not allowed at a foundational level because it is not a resource-dependent use.

Staff recommends that the Commission find that the appeal raises substantial LCP conformance issues and that the Commission take jurisdiction over the CDP application for the proposed project. Due to the above conformance issues, particularly with respect to the LCP water and ESHA resource issues the proposed project raises, staff further recommends that the Commission, on de novo review, deny the CDP. The motions and resolutions to effect this recommendation are found on page 5 below.

required instream flows to be maintained at a level that protects fishery resources, and that required irrigation to ensure that riparian habitat was maintained, and available evidence suggests that neither is the case (see Commission Violation Case Number V-3-21-0105).

² And the Applicant claims that a water connection was already installed and that the Applicant has been paying fees and using such water for irrigation and erosion control purposes for many years on the property. The Commission is unaware of any CDPs that authorized such development, and this too is being tracked as a Coastal Act violation (see Commission Violation Case Number V-3-21-0108).

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EXHIBITS

- Exhibit 1 – Location Maps
- Exhibit 2 – County-Approved Project Plans
- Exhibit 3 – County’s Final Local CDP Action Notice
- Exhibit 4 – Appeals of County’s CDP Decision
- Exhibit 5 – Stage 4 Water Shortage Declaration
- Exhibit 6 – Correspondence Received
- Exhibit 7 – LCP ESHA Maps
- Exhibit 8 – Commission staff comments on the project to the County

1. MOTION AND RESOLUTION

A. Substantial Issue Determination

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

***Motion:** I move that the Commission determine that Appeal Number A-3-SLO-21-0065 raises no substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act, and I recommend a **no** vote.*

Resolution to Find Substantial Issue: *The Commission hereby finds that Appeal Number A-3-SLO-21-0065 presents a substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

B. CDP Determination

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-21-0065 for the development proposed by the Applicants, and I recommend a **no** vote.*

Resolution to Deny CDP: *The Commission hereby denies Coastal Development Permit Number A-3-SLO-21-0065 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.*

2. FINDINGS AND DECLARATIONS

A. Project Location and Description

The County-approved project is located on a 6.64-acre vacant property just outside of the northern edge of the community of Cambria in unincorporated San Luis Obispo County. Cambria is a small residential and tourist community within the Local Coastal Program's (LCP) North Coast Planning Area just south of Hearst Castle. The project site is vacant, undeveloped, rural, and sloping. It is designated in the LCP as Rural Lands and the parcel is fully within the sensitive native Monterey pine forest. The County's approval authorized the construction of a 3,136 square-foot single family residence, 1,000-square-foot garage, 1,000-square-foot workshop, 72-square-foot attached storage, and 32-square-foot attached yard-shed, and related residential development (including grading and removal of some 70 Monterey pine trees). Overall, the project would result in disturbance of 1.4 acres of the site, including 0.6 acres of Monterey pine forest removal. See **Exhibit 1** for location maps and **Exhibit 2** for the County-approved project plans.

B. San Luis Obispo County Approval

On February 19, 2021, the San Luis Obispo County Planning Department approved a Coastal Development Permit (CDP) for the project following a public hearing, despite having been informed by Commission staff that LCP consistency for the proposed

project was not possible. ³ That approval was appealed to the County Board of Supervisors, which, despite staff's comments on behalf of the Commission, denied the appeal and approved the project on September 14, 2021. The County's Final Local CDP Action Notice was received in the Coastal Commission's Central Coast District Office on September 27, 2021 (see **Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on September 28, 2021 and concluded at 5pm on October 11, 2021. Four valid appeals were received during the appeal period (see **Exhibit 4**).

C. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This County CDP decision is appealable to the Commission because the project site is located within an area that constitutes an LCP-designated sensitive coastal resource area (i.e., Monterey Pine forest Terrestrial Habitat (TH)) under the LCP, and because it does not represent the single principally permitted use (PPU) for the Rural Lands land use category.⁴

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., such appeals are only allowed in extremely limited circumstances – see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the

³ Prior to that decision, Commission staff sent directive comments and recommendations to the County suggesting that the project not be approved because of its inconsistencies with LCP water supply and ESHA provisions, and identifying that the Commission had reviewed multiple such projects on appeal in and around Cambria and had both taken jurisdiction and denied them for similar reasons (see **Exhibit 8** for the Commission staff comment letter). In other words, Commission staff did what it could to provide the County with important information regarding the Commission's positions on these matters, including as evidenced by a series of CDP denials of similar projects in recent years.

⁴ The County designates multiple PPU types in the Rural Lands category, meaning that there is no single PPU for appeal purposes, and the County decision here is thus also appealable by virtue of Coastal Act Section 30603(a)(4).

exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the “substantial issue” phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline.

The Coastal Act and the Commission’s implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.⁵ At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony or hold a full hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such full hearing is requested, a substantial issue is automatically found. When the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government’s CDP decision stands. However, if the Commission finds a substantial issue, then the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing on the appeal.

In the second phase of the appeal, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances the Coastal Act’s public access and recreation provisions). This step is often referred to as the “de novo” review phase of an appeal, and it entails reviewing the proposed project in total. There is no legal deadline for the Commission to act on the de novo phase of an appeal. Staff will make a CDP decision recommendation to the

⁵ The term substantial issue is not defined in the Coastal Act. The Commission’s regulations simply indicate that the Commission will hear an appeal unless it “finds that the appeal raises no significant question” (California Code of Regulations, Title 14, (CCR) Section 13115(b)). CCR Section 13115(c) provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act’s public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government’s decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

Commission, and the Commission will conduct a public hearing to decide whether to approve, approve with conditions, or deny the subject CDP. Any person may testify during the de novo phase of an appeal hearing (if applicable).

D. Summary of Appeal Contentions

Cambria has traditionally suffered from an inadequate water supply due to its sole reliance on Santa Rosa and San Simeon Creeks, which are currently over-pumped, leading to adverse impacts to groundwater resources and environmentally sensitive habitat areas (ESHAs), including to the numerous threatened and endangered animal and plants species which rely on these creeks and associated riparian habitats. The appeals contend that the County-approved project is inconsistent with numerous San Luis Obispo LCP groundwater resource and water supply provisions, including those that prohibit any development in Cambria that cannot be served by adequate water. The appeals also contend that the water retrofits approved for the project are inadequate to offset the proposed water use. Finally, the appeals contend that the project approval is inconsistent with the LCP's ESHA policies, which prohibit development from adversely affecting Monterey Pine Forest and sensitive riparian areas such as Santa Rosa and San Simeon Creeks and their watersheds. See **Exhibit 4** for the individual appeals and the Appellants' contentions.

E. Substantial Issue Determination

1. Water Supply

Cambria Water Supply Background

CCSD Creek Extractions

Cambria's water supply depends entirely on the groundwater aquifers associated with Santa Rosa and San Simeon Creeks (collectively "the Creeks"). Santa Rosa Creek flows through the middle of the community, while San Simeon Creek is located some two miles or so to the north of town. The Creeks flow from their respective headwaters and both terminate into lagoons, which ultimately connect to the Pacific Ocean. In addition to domestic and agricultural demands for water from the Creeks, environmental demand in the form of adequate instream flows is necessary to sustain the Creeks' high-quality habitat for a variety of aquatic and terrestrial species. The United States Fish and Wildlife Service (USFWS) designates the Creeks as critical habitat⁶ because they provide habitat for multiple federally threatened species, such as the South-Central Coast steelhead and California red-legged frog, and for the federally endangered Tidewater goby.⁷

⁶ "Critical habitat" is defined in part as an area which is essential to the conservation of a listed species. Santa Rosa and San Simeon Creeks support multiple threatened and endangered species, including but not limited to South-Central Coast steelhead, California red-legged frog, and Tidewater goby.

⁷ All listed species under the Federal Endangered Species Act, and the California red-legged frog is also designated by the California Department and Fish and Wildlife (CDFW) as a State Species of Special Concern (meaning it is vulnerable to extinction) with a CDFW S2S3 ranking (meaning this species is designated as "vulnerable" and "imperiled" with a moderate to high risk of extinction). South-Central Coast steelhead and Tidewater goby are ranked by CDFW as S2 and S3 (meaning steelhead are

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

Due to these water supply problems, CCSD applied to the California State Water Resources Control Board (SWRCB) for the rights to withdraw a total of 1,230 afy of groundwater from the nearby (i.e., again, just north of the community and north of Santa Rosa Creek) San Simeon Creek basin annually. According to the final EIR for that water rights application, the proposed water extractions were found to have the potential to adversely affect riparian habitat and degrade anadromous fish resources, particularly steelhead trout. Due to these identified impacts, the California Department of Fish and Wildlife⁸ protested CCSD's water rights application. CDFW eventually withdrew its protest when CCSD agreed to two conditions of approval. First, CCSD agreed to maintain water levels in the basin to sustain stream flow to the lagoon to protect fish and riparian habitat. Second, CCSD agreed to maintain irrigation facilities in order to maintain riparian vegetation. Based upon information that suggested the San Simeon Creek basin would not be able to safely and reliably produce 1,230 afy under these terms, CCSD also sought approval to supplement this San Simeon Creek water supply with continued withdrawals from the Santa Rosa Creek basin in order to maintain service to existing customers, but only in times of emergency. SWRCB ultimately approved CCSD's application for water rights to annually extract 1,230 afy total from San Simeon Creek and Santa Rosa Creek combined, subject to the agreed-upon CDFW conditions.⁹

These CCSD's Creek-related extractions were then permitted by the Coastal Commission pursuant to CDP 132-18, which the Commission initially conditionally approved in 1977, shortly after the enactment of the Coastal Act. The Commission

designated "imperiled" and at a high risk of extinction, and goby are designated "vulnerable" and a moderate risk of extinction, respectively).

⁸ At the time the agency was called the California Department of Fish and Game.

⁹ SWRCB recently reduced the amount of water that CCSD could extract from the Creeks to less than the level allowed under their original 1977 approval, particularly during the dry season (see "*Issuance of Water Right Licenses 13916 and 13917*," SWRCB, March 14, 2019). SWRCB's 2019 water right license materials reduce CCSD's allowed extractions from the Creeks to no more than 1,017 afy (i.e., a maximum of 799 afy from San Simeon Creek, where no more than 370 afy of that extraction can be during the dry season, and a maximum of 218 afy from Santa Rosa Creek where no more than 155.3 afy of that extraction can be during the dry season), all still subject to the same terms and conditions, including regarding maintaining water levels in the basin to sustain stream flow to the lagoon to protect fisheries and riparian habitats.

found that, although the proposed 1,230 afy of water withdrawals from San Simeon Creek had the potential to adversely impact biological resources, the project could be found consistent with the Coastal Act because of CDFW's requirement that CCSD maintain instream flows and irrigate vegetation in order to maintain and protect fishery resources and riparian habitat. The primary intent of these Creek-protective measures was and is to ensure that adequate water remains instream to support the Creeks' sensitive fisheries and riparian habitats, and to prevent overdraft of the underlying groundwater aquifers.¹⁰ In addition to these measures to protect the Creeks, the Commission found that Santa Rosa Creek was "the most important anadromous fish stream in San Luis Obispo County" and therefore required CCSD to discontinue its use of wells along Santa Rosa Creek as its primary water supply once the San Simeon Creek wells were established. The CDP only allows withdrawals from the Santa Rosa Creek wells if necessary to supplement CCSD's water supply in an emergency if/when water cannot be safely removed from San Simeon Creek. Notwithstanding this CDP requirement and limitation, according to CCSD's records, water withdrawals from Santa Rosa Creek have occurred every year except one since 1988.¹¹ And CCSD indicates that its withdrawals have ranged up to 269 afy from Santa Rosa Creek and up to 799 afy from San Simeon Creek since 1988. Finally, based on available information it appears that CCSD is not adhering to the terms and conditions of its Commission CDP as it relates to maintaining adequate instream flows for fishery health, and to irrigating riparian areas to ensure their health as well.¹²

CCSD 2001 Moratorium/County 2007 LCPA

Since the time of its initial 1977 approval of the CCSD's CDP for water extractions from the Creeks, the Commission has continually expressed concern regarding Cambria's capacity to maintain a reliable and environmentally sustainable water supply.¹³ In fact, as the Commission has made clear and in multiple LCP, appeal, and CDP cases,¹⁴ the

¹⁰ Overdraft occurs when water is pumped beyond the safe yield of a groundwater aquifer, leading to adverse impacts, such as subsidence, in which an aquifer's geological structures compress, which may result in irreparable damage to an aquifer's capacity to store water. When such groundwater is associated with rivers and streams, other adverse impacts can include a reduction in flows necessary to sustain biological organisms, including sensitive species. Overdraft can also cause seawater to intrude into an aquifer causing degradation of the quality of the freshwater supply. All of these impacts are known to affect Santa Rosa and San Simeon Creeks and their groundwater aquifers.

¹¹ And the records provided by CCSD only go back until 1988, so it is not clear at this time how much water was withdrawn from these Creeks prior to that time.

¹² And the Commission is tracking this as a Coastal Act violation (see Commission Violation Case Number V-3-21-0105).

¹³ See, for example, analyses associated with the Commission's findings for the 1998 LCP North Coast Area Plan (NCAP) Update and for the 2001 San Luis Obispo County LCP Periodic Review, in which the Commission analyzed the issues and the problems in some depth, including identifying the need for additional studies and measures to assure protection of the Creeks given they were being over-drafted for municipal purposes.

¹⁴ See, for example, the 1998 LCP NCAP Update, the 2001 LCP Periodic Review, and LCP Amendment SLO-MAJ-1-06 Part 1; and see, for example, A-3-SLO-01-122 (Cambria Pines Lodge Expansion); A-3-SLO-02-050 (Monaco SFD); A-3-SLO-02-073 (Hudzinski SFD); A-3-SLO-13-0213 (Kingston Bay Senior

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

In order to address these issues, including the Commission's concerns, CCSD enacted a moratorium on new water connections in 2001.¹⁵ CCSD exempted from this moratorium certain proposed development projects in Cambria that were then on CCSD's water service commitment list. Ultimately, the LCP was amended six years later in 2007 (LCP Amendment SLO-MAJ-1-06 Part 1) to include additional standards in the LCP's North Coast Area Plan specific to new development proposed within Cambria to require certain projects to explicitly demonstrate that they would not adversely impact Santa Rosa and San Simeon Creeks, and to require the use of retrofits and offsets in Cambria for any otherwise LCP-consistent new water use. Specifically, NCAP Planning Area Standards B.4(a) and (B) were added to the North Coast Area Plan as follows:

The following standards apply to development on lands within the Cambria Urban Reserve Line...

NCAP Planning Area Standard B.4(A): Limitation on Development. *Until such time as may be otherwise authorized through a coastal development permit approving a major public works project involving new potable water sources for Cambria, new development not using CCSD connections or water service commitments existing as of November 15, 2001 (including those recognized as "pipeline projects" by the Coastal Commission on December 12, 2002 in coastal development permits A-3-SLO-02-050 and A-3-SLO-02-073, shall assure no adverse impacts to Santa Rosa and San Simeon Creeks;*

NCAP Planning Area Standard B.4(B): Water Conservation Requirements. *Unless this requirement is otherwise modified through a coastal development permit authorizing a major public works water supply project for Cambria, new*

Living); A-3-SLO-14-0044 (Fox SFD); A-3-SLO-19-0199 (Hadian SFD); and A-3-SLO-20-0047 (Settimi SFD).

¹⁵ As part of the CCSD's Water Code 350 Emergency Declaration on November 15, 2001.

development resulting in increased water use shall offset such increase through the retrofit of existing water fixtures within the Cambria Community Service District's service area, or through other verifiable actions to reduce existing water use in the service area (e.g. the replacement of irrigated landscaping with xeriscaping). Accordingly, all coastal development permits authorizing such development shall be conditioned to require applicants to provide to the Planning Director (or the Coastal Commission Executive Director where applicable) for review and approval prior to construction, written evidence of compliance with CCSD Ordinance 1-98, as approved by the CCSD Board of Directors on January 26, 1998, and modified on November 14, 2002, and as codified in CCSD Code Chapter 4.20 in 2004; however, no retrofit credits may be obtained by extinguishing agricultural water use, or funding leak detection programs. Such permits shall also be conditioned to require written confirmation from the CCSD that any in-lieu fees collected from the applicant have been used to implement projects that have reduced existing water use within the service area in an amount equal or greater to the anticipated water use of the project.

Ultimately, the primary purpose of the amendment was to strictly limit new development requiring new water service in Cambria until the CCSD secured new water sources. At that time, the Commission found that:

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

Application of LCP/NCAP Standards

Despite this clear admonition about a lack of water to serve new development, the County has continued to argue that the 2007 LCP amendment created an 'override' that would allow certain new water using development in Cambria to be approved notwithstanding the lack of an adequate water supply (i.e., where an adequate water supply is required by LCP Public Works Policy 1). The County's position is that any development that can show that it had some form of CCSD commitment to provide water prior to the 2001 moratorium (whether actual water using development or any other commitment identified by the CCSD) and that participates in the CCSD retrofit program can be approved consistent with the LCP by virtue of the above-referenced two NCAP provisions from 2007. While there is some ambiguity in the NCAP Planning Area Standard B.4(A) and (B) language itself, four things should be noted.

First, these policies do not represent and do not include any type of language that would suggest that they can be used to override other LCP provisions. On the contrary, the policy simply added an additional requirement to certain projects that they also demonstrate no adverse creek impacts in addition to otherwise meeting all other LCP policies. As it affects water supply, that means that a project must still show that it can be served by an adequate and sustainable water supply (see also LCP discussion that follows). And in terms of ESHA, that also means that a project

must also still show that it can be developed in a way that protects ESHA as the LCP requires. The Commission, in approving the LCP amendment in 2007, did not add any sort of override, including as to do so would be inconsistent with numerous Coastal Act policies and coastal resource protection principals. There is no language in these policies that explicitly point to any sort of override and such a drastic departure from consistency from Coastal Act resource protection policies cannot be found by implication. In fact, as succinctly stated by the Commission in its 2007 findings above, there was (and is) no water available for new development in Cambria.

Second, NCAP Planning Area Standard B.4(A) identifies the types of projects that are required to make the additional 'no adverse creek impacts' finding, but doesn't somehow suggest that projects that aren't explicitly required to make that finding can otherwise run roughshod over such creek resources contrary to the clear resource protection policies contained elsewhere in the LCP. Or, put another way, that those projects are somehow allowed to lead to adverse impacts to creek resources otherwise regardless of what the LCP requires in other provisions. The above standards do not say that, and stand for no such thing. Simply put, it identifies an additional requirement that some development is also required to ensure, and it does not somehow conversely say that all other development is given a 'free pass' from the LCP's provisions that otherwise protect these creeks (including groundwater, surface water, ESHA, stream, creek, riparian and related policies). Such a 'free pass' would be blatantly inconsistent with the Coastal Act, which remains the overarching policy from which the LCP derives its authority.¹⁶

Third, the projects required to make that additional finding have been interpreted by the County to not include any projects that had any type of commitment from CCSD prior to CCSD's 2001 water moratorium, regardless of whether that commitment was represented by an actual existing water use at the time or by any number of other categories of commitment that did not involve active water use that the CCSD identified pre-moratorium (e.g., will-serves, unused water meters, etc.). As a foundational matter, there is no denying that the applicable planning area standards clearly only apply within the Cambria Urban Reserve Line (URL), so no matter what meaning the County ascribes to them, they cannot be applied outside the URL (and there are CCSD commitments of one form or another outside the URL, like the appealed project in this case). In addition to the URL requirement, and although the standard does refer to pre-moratorium CCSD 'commitments' broadly, the Commission has generally understood those projects to be those that both had valid pre-moratorium water allocations (generally in the form of an intent-to-serve (or "will

¹⁶ LCP provisions must be understood in relation to the relevant Coastal Act section or sections from which a specific LCP provision derives its authority (see *McAllister v. Coastal Commission* (2008) 169 Cal.App.4th 912). To interpret these two NCAP standards in the way that the Applicant, County, and CCSD suggest would be inconsistent with Coastal Act Sections 30230, 30231, and 30240, from which the above LCP policies derive their statutory authority. There are no "gotchas" in an LCP that allow it to so fully deviate from the Coastal Act policies that animate the LCP.

serve”) letter from the CCSD), and that had County-accepted pre-moratorium CDP applications (and the Commission has often lumped these projects under the umbrella term of “pipeline projects”).¹⁷ Thus, whereas the Commission has historically seen this category of project as a fairly small subset of potential projects, the County has taken a much more expansive interpretation. And on top of that, the County has further interpreted such projects as essentially being allowed to override other applicable LCP requirements. The Commission does not agree with either of these interpretations, and has expressed as much repeatedly for many years.

And finally, the LCP construct is that first a project must be able to be served by an adequate, verifiable, and sustainable water source as required by LCP Public Works Policy 1. And in Cambria, all projects that can meet that criterion are also required to offset their water use, and some projects in the URL must also explicitly be shown to not result in adverse creek impacts. Only a relative handful of such projects have been approved by the County and constructed in Cambria under this construct. Further, it is now clear based on current understandings, data, and assessments, that although the LCP lays out this potential approval path for Cambria-area development, there is simply no way that development which requires new water use in Cambria using CCSD water supplies can be found LCP consistent in terms of water supply, whether it has any sort of CCSD commitment or not.¹⁸

Applicant's Comments

Related to the above LCP/NCAP discussion, it is noted that the Applicant's attorneys have argued that the Applicant has a CCSD “grandfathered meter” that allows the

¹⁷ And the Commission identified such qualifying projects not due to any finding that they would not lead to harm to the existing water supply from adding more water demand to the system, rather it was considered a matter of equity and fairness to recognize CCSD commitments and CDP applications then in process in some way. But again, not in a way that somehow excused them from meeting LCP requirements, but rather as a means of identifying which projects would need to make the required additional NCAP standard finding.

¹⁸ On this point the Applicant suggests in his September 15, 2021 letter that other similarly situated projects in the same subdivision as the Applicant have all been approved by the Commission, stating that “100% of every Liemert Tract lot that applied for a permit were approved and developed after the Moratorium, between 2007 and 2019, with the latest approved in 2019”). However, the Commission has not approved any CDPs for residential development in this subdivision. Although it appears that the County has approved residences there (what appears to be 8 such residences between 2005 and 2013, and one in 2018 (not 2019)), these approvals were not appealed to the Commission and accordingly the Commission has not approved them. In fact, the only case that was appealed to the Commission in this subdivision was the Applicant's prior project on the adjacent site, which was denied due to water supply and ESHA LCP inconsistencies in 2019. To suggest that the Commission somehow supported such County approvals and somehow acquiesced to such projects being LCP consistent is incorrect. The Commission did no such thing. The last CDP the Commission approved for an SFD in Cambria was in 2002, nearly two decades ago, and well before more recent data came to light about the health of the creeks. The Commission has learned much since then about the nature of the Cambria water supply problem, including only recently becoming aware that CCSD was violating the terms and conditions of its water extraction CDP, as well as new information regarding the health of the Creeks and CCSD's various will-serve, water commitment, and retrofit issues (see also below). And since that time the Commission has denied two CDPs based on similar findings, and has not approved nor supported a single new single-family residence in Cambria.

Applicant to bypass LCP requirements in the manner suggested above by the County (see Applicant's September 15, 2021 correspondence in **Exhibit 6**). On this point several things are noted. First, the Applicant argues and alleges that he has a grandfathered meter because an actual water meter connection was installed on April 16, 2001, that he has been paying water service fees to CCSD, and that he currently uses such water for irrigation and erosion control purposes.¹⁹ If such development has occurred, then it occurred without benefit of a CDP (as the Commission is not aware of any CDPs authorizing same), and as such, it is not recognized as legal development that can be countenanced in the context of this current CDP application and appeal. On the contrary, only legal development is relevant in this review and, the baseline for this CDP/appeal consideration is as if the unpermitted development did not exist.²⁰

Second, in support of his argument, the Applicant proceeds to provide a detailed explanation of CCSD actions, definitions, lists, and data. However, the standard of review for determining LCP consistency is the LCP, and not non-LCP CCSD documentation, which is not relevant in such an evaluation. The CCSD is not charged with implementing the Coastal Act or LCP (though it is required to comply with the Coastal Act and LCP per the terms of its own CDP).

Third, the Applicant claims that he has vested rights to a water connection that are somehow being threatened. However, regardless of the alleged CCSD designation of the properties as "grandfathered meters" and any rights that may give the property owners vis-à-vis CCSD, the question for this Commission is whether to provide separate Coastal Act authorization (i.e., through the LCP) for the proposed development. The concept of vested rights under the Coastal Act relates to development that is recognized as legally pre-dating CDP requirements.²¹ Under the

¹⁹ The project site was part of a 1997 subdivision that created 18 separate lots (note that the Commission has not to date located a County CDP approval that ran a Commission appeal period without an appeal, as would be required to make such a CDP effective – see also violation finding below).. Because the subdivision was outside of CCSD's designated service boundaries, CCSD would not provide the parcels with intent-to-serve letters at the time when the subdivision was approved by the County. Following the initiation of litigation by the then-owner of the subdivided property (the Walter H. Leimert Company), CCSD and the property owner entered into a settlement agreement that required two primary things: 1) the Leimert Company to install water meters and associated infrastructure to the 18 lots; and 2) the CCSD to provide intent-to-serve letters for the 18 newly created lots in exchange for the payment of connection fees and the conveyance to the CCSD of fee titled for four lots located elsewhere in Cambria. The water meter on The Applicant's property was apparently installed in 2001. However, it does not appear that the settlement agreement's provisions, including the installation and use of a water meter and flowing water on the Applicant's property, ever received any Coastal Act authorization (i.e., and the settlement agreement's provisions post-dated any County CDP approval). And it appears that CCSD apparently did not think that the Applicant was entitled to water service in the same way that the Applicant did, including as evidenced by the fact that CCSD just issued a will serve for the proposed project in 2019.

²⁰ And the Commission is tracking such alleged development as a Coastal Act violation (see Commission Violation Case Number V-3-21-0108).

²¹ See Coastal Act Section 30608, referring to one "who has obtained a vested right in a development prior to the effective date of this division," (i.e., January 1, 1977) via the Coastal Act's

Coastal Act and the Commission's implementing regulations, the subject development is presumed not to be so vested, and the burden of proof is on an Applicant to prove that a development was legally in place prior to CDP requirements (i.e. prior to January 1, 1977). As a foundational matter, development that commenced in 2001, as stated by the Applicant, does not qualify for vested rights. In addition, no vested rights application has been submitted in any case (see also CCR Section 13201).

Fourth, the Applicant takes exception to prior Commission actions and findings that describe "pipeline projects" as those that are the only projects that are not required to meet the additional 'no adverse impact to the creeks' criterion associated with the NCAP as described above, and claims that other sorts of CCSD commitments (such as 'grandfathered meters') qualify as well.²² The Applicant misunderstands the Commission's perspective here. To be clear, the Commission has historically referred to such qualifying projects as "pipeline projects" as a shorthand for referring to such qualifying projects. Thus, the Applicant raises a distinction that makes no actual difference. Either a project qualifies or it doesn't, and it is not the terms that qualify it, but rather the relevant criteria (described above).

Fifth, the Applicant misses a key qualifying criterion, namely that the additional finding requirements only applies to projects that are located within the LCP's Urban Reserve Line, or URL, and the subject site is located outside of the URL, and thus doesn't qualify on that criterion alone. This is dispositive with relation to the arguments the Applicant makes related to NCAP Planning Area Standard B.4(A) and NCAP Planning Area Standard B.4(B). Further, as described above, even if the Applicant's project so qualified, the LCP does not stand for the premise alleged by the Applicant that the Applicant is "exempt from the Moratorium and the obligation to assure no adverse impacts to water resources." On the contrary, as detailed above the project is required by the LCP to show an adequate and sustainable water source, and it cannot.

Finally, sixth, the Commission has made clear that (a) it does not believe that anymore qualifying projects exist, and (b) even if they did exist, the fact that a project so qualifies does not somehow suspend the requirements of the LCP as suggested by the County. To this point, the NCAP indicates (see page 2-6 of the North Coast Area Plan) that the identification of such commitments (or in the Commission's parlance and understanding, 'pipeline projects' as identified above), was based, in part, on the CCSD's "reliability conclusions of the CCSD's Water Supply Analysis during a November 15, 2001

vested rights application process (see also Title 14, Division 5.5, California Code of Regulations (CCR) Section 13200 et seq).

²² The Commission understands the frustration the Applicant has regarding the complicated nature of development within Cambria, including in terms of the various lists and designations CCSD uses to categorize proposed water-using development. And the Commission takes the points raised in the Applicant's attorney's letter very seriously regarding these potential 'pre-2001' development projects and gave serious thought to how the LCP governs such development. For all the reasons discussed in this report, including the Commission's findings in the 2007 LCPA and the subsequent water supply and creek health status since then, it is now even more clear that any new water using development, whether a 'pipeline project' or 'existing commitment' or 'pre-2001 project' or not, cannot be found consistent with the LCP.

meeting.” In other words, CCSD believed at the time in 2001 that there was sufficient water to serve the remaining pipeline projects without adverse impacts. And thus the provisions it made, and ultimately the LCP tests certified by the Commission related to additional findings for Cambria water using projects, were based on this 2001 finding of sufficient water. The overwhelming evidence gathered since that time suggests that the CCSD’s 2001 conclusions were incorrect in that regard, and there is not sufficient water to serve even existing development without significant adverse coastal resource impacts. Put another way, even the understanding that underlies the Applicant’s argument regarding CCSD pre-2001 moratorium commitments is incorrect, as the now known evidence clearly shows. Thus, due to the severity of the water supply problems and associated coastal resource degradation (both as evidenced by Commission findings since at least 2014, and as documented herein), there is simply no way that new water using development in Cambria using CCSD water supplies can be found LCP consistent in terms of water supply, whether it qualifies per that pre-2001 commitment standard or not.

Recent Water Supply Related Information/Actions

Today, 20 years after the CCSD water moratorium and 14 years after the LCP NCAP amendment where the Commission found that there was no water to serve new development in Cambria consistent with the LCP, a new water supply has not been identified and the Creeks and their groundwater basins continue to suffer from overdraft. In 2008, the San Luis Obispo County Board of Supervisors adopted an “Alert Level III” for Cambria’s water supply under the LCP’s Resource Management System.²³ The LCP identifies an Alert Level III as the most severe constraint level, where the existing demand of the resource has met or exceeded the available capacity.

Subsequently, in 2014, CCSD declared a “Stage 3 Water Shortage Emergency”²⁴ and acknowledged it did not and does not have an adequate water supply to support Cambria’s existing water demand. Existing wells at that time were lower than two feet above sea level and in the absence of a new water supply, CCSD projected that sometime in 2014 “the community stands a real chance of literally running out of water, forcing Cambrians to shut businesses and possibly even leave homes.”²⁵ In response to this declared water emergency, San Luis Obispo County granted CCSD an Emergency CDP (ECDP) in June 2014 for a desalination plant atop San Simeon Creek meant to provide a temporary emergency water supply, despite Commission staff’s articulated concerns at the time (and since) regarding the coastal resource impacts associated with

²³ The RMS is a component of the Land Use Plan (LUP) that provides one of the tools for identifying and addressing identified resource constraints and capacities (e.g., water supply and wastewater treatment capacities). The main purpose of the RMS is to provide the County and the general public with a systematic means of assessing resource constraints and capacities on a regular basis, including annual reassessments that allow the County to regularly update such assessments in relation to the best available information, and to identify measures to address such issues.

²⁴ The Stage 3 Water Shortage Emergency was declared by the CCSD Board of Directors pursuant to Water Code Section 353, which allows governing bodies to adopt regulations and restrictions on water deliveries to conserve water for the greatest public benefit.

²⁵ See “Cambria’s Emergency Water Supply Project: Questions and Answers,” CCSD. November 3, 2014.

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

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

And in the time since, the Cambria water shortage has only gotten even more severe. To that point, earlier this year on July 15, 2021, CCSD declared a Stage 4 Water Shortage Emergency, the most restrictive in San Luis Obispo County to date.²⁶ The Stage 4 declaration "finds that the demands and requirements of water consumers cannot be satisfied without depleting the water supply of the CCSD to the extent that there would be insufficient water for human consumption, sanitation and fire protection".

In short, Cambria has a critically short water supply, where extractions to serve the

²⁶ See CCSD resolution 26-2021.

community significantly adversely affect significant coastal resources, including Santa Rosa and San Simeon Creeks and associated sensitive riparian habitats (see also additional description and discussion on this point in the ESHA section that follows). These impacts are explicitly prohibited by both CCSD's SWRCB water license as well as the Commission's CDP to the CCSD recognizing same.²⁷ The CCSD moratorium and its Stage 3 and 4 Water Shortage Emergency declarations and the LCP's Level III RMS designations continue to remain in effect today. As does the LCP's requirement for identifying an adequate water supply to serve new development as a prerequisite to CDP approval.²⁸ In fact, the same water supply issues that have affected Cambria for decades (as reflected in the discussion above) apply today in even more extreme ways. Even water supply to existing development is problematic in relation to the substantive standards of the applicable LCP provisions, without even considering new development. As stated succinctly by the Commission in 2007 as part of its approval of LCP Amendment SLO-MAJ-1-06 Part 1, and still pertinent today, especially as more is known about the severity of the problems: "adequate public water supplies are not currently available for new development in Cambria."

CCSD Will-Serves

Notwithstanding these clear points about the LCP, CCSD has continued to offer to provide new water services for proposed new development, as it did here, and the County has on occasion approved development based on CCSD intent-to-serve letters to that effect, as it did here. There are significant LCP interpretation and coastal resource concerns with the County's approach. CCSD has justified the issuance of intent-to-serve letters in three main ways. First, CCSD has simply made additional water commitments, notwithstanding the moratorium and the applicable LCP provisions, and estimates that there are some 32 proposed development projects (i.e., not pre-moratorium projects, but more recent) currently pending that would represent new service to which it would provide intent-to-serve letters. CCSD indicates that this number can be increased at any time through court order, settlement agreement, or resolution by the CCSD's Board of Directors (Board). However, none of these commitments reflect an assessment of the sustainability of the Santa Rosa and San Simeon Creek systems to actually provide additional water. And as described above, these creeks are suffering significantly from the effects of supplying water to even existing development.

Second, CCSD also states that it will provide service and new connections to undeveloped vacant parcels that have purchased an "active service transfer" whereby a vacant "receiver" parcel purchases an existing water meter from a "sender" property. Although the active water meter transfer transaction may include permanent retirement of the "sender" property, thus in theory offsetting the new connection of the "receiver" site, often the sender property is served by multiple water meters and sells an "extra" water meter without actually reducing water consumption. Although CCSD cannot currently confirm the exact number of vacant "receiver" parcels on its active water meter

²⁷ Again, see Commission Violation Case Number V-3-21-0105.

²⁸ See LCP Public Works Policy 1 and CZLUO 23.04.430 below.

transfer list, CCSD has estimated that approximately 12 parcels are currently on the list, and it has further indicated that the number may increase at any time if additional water meter transfers are approved by the Board. The LCP does not account for nor condone such meter transfers as a method for ensuring adequate water supply, including in terms of some type of “meter market exchange.” And, more importantly, it is not clear how such a system would actually be able to satisfy LCP tests even if it were to have any LCP status, which it does not.

And finally, CCSD in the early 1990s determined that it would supply new water service to affordable housing projects at a rate of six such units per year, and that the units would be carried over from year to year if not brought online. In 2013 the CCSD capped the number of affordable units at 89. None of these allocations consider the impact of the new units on the CCSD’s limited water supply, nor the impact of additional withdrawals from San Simeon and Santa Rosa Creeks. In fact, the allocation scheme described above predates both the CCSD moratorium and more current water supply data as discussed above. Again, although the LCP does encourage the provision of affordable housing, it does not provide a means for new water service absent a finding that it can be served by adequate water. Currently, the CCSD indicates that it has active applications for 32 additional new affordable housing units.

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

CCSD’s Retrofit Program

Pursuant to LCP Policy NCAP Planning Area Standard 4(B), if new development in Cambria that requires new water service that leads to an LCP-allowable increase in water use, then such projects are required to “offset such increase through the retrofit of existing water fixtures within the Cambria Community Service District’s service area, or through other verifiable actions to reduce existing water use in the service area (e.g. the replacement of irrigated landscaping with xeriscaping).” In practice, and bracketing whether such projects could meet the LCP’s adequate water supply criterion, such offsets have occurred through CCSD’s retrofit program. Specifically, prior to issuing an intent-to-serve letter, CCSD requires the proposed development to participate in its

retrofit program to attempt to offset its proposed water use. The program is designed to replace older water fixtures in existing homes with newer more efficient fixtures to reduce water consumption (e.g., such fixtures may include showerheads, toilets, laundry machines, irrigation systems, dishwashers, etc.). Proposed development may either install their own verified retrofits or purchase “retrofit points” that have been “banked” by the CCSD.

CCSD indicates that such retrofit points are accumulated in multiple ways, all of which are required and specified in Section 4.20.030 of the CCSD Municipal Code. Points are accrued whenever the installation of high-efficiency water use fixtures occurs as a result of 1) change of ownership; 2) expansion of use; 3) resale; and 4) from district rebate programs. The identified water savings are calculated and “banked” as retrofit points. Per CCSD, each point is intended to represent the saving of 1.47 gallons of water per day.

Much of the community of Cambria has already been retrofitted with efficient fixtures, and there are limited options available for additional retrofits. As a result, CCSD indicates that most required water use offsets are accomplished through the purchase of retrofit points, which have already been banked from retrofits that were already required to be installed. CCSD indicates the cost is \$50 per point. CCSD maintains a “Retrofit Points Equivalency Table” that explains the number of points a particular project needs to purchase, which is updated by the CCSD Board annually. For single-family homes, the number of points needed is determined based on the number of bathrooms and square footage of the project parcel.

There are a variety of problems with CCSD’s retrofit program that suggest that, at best, it is unclear if it actually accomplishes what the LCP requires, namely an actual physical reduction in use of water that is equivalent to the amount of water that would be used (when allowed by the LCP otherwise). First, the actual retrofits that are turned into points by CCSD are required by CCSD ordinance and would occur regardless of any point banking. In fact, when the ordinance was adopted, these retrofits were not intended to be “pre-allocated mitigation” that can be “banked” for some future impact (i.e., as mitigation banks are typically structured); rather they are independently required by regulation because of the issues the community had and still has with water supply adequacy with respect to new development projects. To require them once for this purpose, and then to allow others to rely on them for additional offsets would appear to be a form of “double-dipping” on the benefits of the mitigation required in each case of offset.

To actually offset proposed new water use, any offsetting reductions must be derived from the project itself and applied independently of prior actions and requirements designed to reduce water use for other purposes and projects. Further, CCSD indicates that it does not even have a database of the existing retrofit points and does not know how many points are in its “bank.” In fact, there appears to be little to connect the purchase of retrofit points, were that even to be appropriate as an offset tool, to actual water use reduction, meaning any real reduction or even “no-net increase” of water usage based on purchase of offset credits may simply be illusory.

In addition, CCSD has indicated that it does not re-inspect the installed retrofits after the initial 60-day calculation inspection. Thus, property owners could inadvertently (or intentionally) remove the retrofits (e.g., by replacing a showerhead, removing an aerator, or installing non-drip irrigation) and the water use reduction would not necessarily actually be realized. According to CCSD's last inventory of its retrofit bank in January 2014, over 70% of the banked retrofits were accomplished through showerhead and aerator replacements, which are the also the easiest and most common retrofits to remove. In addition, once retrofit points are purchased or retrofits are installed, CCSD does not require any further water offsets regardless of future water consumption. In other words, if a proposed project is built and actually uses more water than originally estimated, the project is not required to offset the additional water use and the project would then lead to an overall increase in Cambria's water use (assuming that the original retrofits installed or points purchased led to an actual reduction in water consumption in the first instance, which is questionable). Because CCSD does not have an accounting of its retrofit points, including from which retrofit they were generated, it is also possible for the same structure to be retrofitted more than once, and to be deemed to have reduced the same amount of water use over and over again, and to generate additional retrofit points, even if only one water use reduction episode actually occurred. CCSD also does not have information regarding actual ongoing water use of retrofitted properties to determine whether the calculated water savings has led to an actual reduction in water use. CCSD also does not reduce allocated water entitlements for retrofitted structures to ensure that actual water consumption is decreased. Once the retrofits are calculated and banked, the points are available for purchase regardless of actual water savings.

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

As a result of the uncertainty in actualizing water offsets under the current retrofit program, CCSD is in the process of pursuing potential revisions through a new "Demand Offset Program". Under the proposed program as currently understood, the points bank would be eliminated and actual retrofits within the system would be required to offset water use associated with new development. The proposed revised program also currently includes the requirement for a "Net Zero Groundwater Use Report" prepared by a qualified professional, where such report is intended to estimate how much water is used by each surveyed property each year, and to track where and how the offsets are achieved. CCSD would then set a water allocation for the development

based off the report, and would implement surcharges if the property exceeds these allocations. CCSD plans to use the money generated from surcharges to fund water conservation efforts. Currently, the Applicant has satisfied retrofit requirements by purchasing of retrofit points from the points bank. However, if this new program were to be approved, and be applicable, the Applicant could instead use this new program.

In sum, currently, the CCSD retrofit program suffers from a series of issues that appear to indicate that it does not actually serve to offset water use in the manner required by the LCP. Per the language of LCP Policy NCAP Planning Area Standard 4(B), CCSD's retrofit program is not a *verifiable* action that actually reduces water use in the service area for the reasons discussed above. And while the revised offset program may achieve greater water savings than the current program, it is uncertain when it will be implemented, and whether it will actually achieve its envisioned offsets. Further, much more is understood today about the effect of CCSD extractions on Santa Rosa and San Simeon Creeks, and the degree to which even existing demand is leading to significant adverse impacts, and it is not clear to what extent a new program could help to resolve such problems. Also, existing CCSD extractions are currently occurring inconsistent with their CDP, and at a level that leads to adverse and disallowed Creek impacts. In short, the idea that the above-described retrofit program can effectively protect resources as is required by the LCP is not credible nor realistic.

Applicable LCP Provisions

The San Luis Obispo County LCP is divided geographically into four areas,²⁹ each with its own LCP area plan that forms one component of the Land Use Plan (LUP). The LUP also includes two documents that list policies applicable throughout the coastal zone: one titled the "Coastal Plan Policies" (Coastal Plan) and another the "Framework for Planning." The Implementation Plan consists of the "Coastal Zone Land Use Ordinance" (CZLUO), which is also applicable throughout all four LCP areas. The subject property is located within the area governed by the North Coast Area Plan (NCAP).

The Coastal Plan lays out the main objectives of the LCP. With respect to Public Services, Public Works Policy 1 indicates projects can only be approved if there are adequate services to serve such projects. CZLUO Section 23.04.430 carries out this policy, requiring the County to find that adequate water and sewage disposal capacity exists prior to approving any new development in San Luis Obispo County. Coastal Watershed Policies 1 and 2 protect the integrity of groundwater basins, including by requiring that the basin's safe yield is not exceeded. These provisions state:

Public Works Policy 1: Availability of Service Capacity. New development (including divisions of land) shall demonstrate that adequate public or private service capacities are available to serve the proposed development. Priority shall be given to infilling within existing subdivided areas. Prior to permitting all new development, a finding shall be made that there are sufficient services to serve the proposed development given the already outstanding commitment to existing lots within the urban service line for which services will be

²⁹ The County's four areas are: North Coast, Estero, San Luis Bay, and South County.

needed consistent with the Resource Management System where applicable. (emphasis added)

CZLUO 23.04.430: Availability of Water Supply and Sewage Disposal

Services. *A land use 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, as provided by this section.*

Policies for Coastal Watersheds Policy 1: Preservation of Groundwater

Basin. *The long-term integrity of groundwater basins within the coastal zone shall be protected. **The safe yield of the groundwater basin, including return and retained water, shall not be exceeded** except as part of a conjunctive use or resource management program which assures that the biological productivity of aquatic habitats are not significantly adversely impacted. (emphasis added)*

Policies for Coastal Watersheds Policy 2: Water Extractions. *Extractions, impoundments and other water resource developments shall obtain all necessary county and/or state permits. All pertinent information on these uses (including water conservation opportunities and impacts on in-stream beneficial uses) will be incorporated into the data base for the Resource Management System and shall be supplemented by all available private and public water resources studies available. **Groundwater levels and surface flows shall be maintained to ensure that 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.** (emphasis added)*

The North Coast Area Plan (NCAP), which is also part of the LUP, includes additional guidance for the areas in and around Cambria, and includes an extensive policy framework meant to protect the area's rich coastal resources. This includes through policies that protect groundwater and associated riparian areas, require an adequate water supply to serve new development, limit growth to areas with adequate public services, and direct development to existing developed areas best able to accommodate it. The NCAP acknowledges that Cambria has a severely limited water supply that has long been recognized as inadequate to serve new development, and provides clear protection for its creek resources, stating:

NCAP Combining Designations Policy 5: North Coast Creeks. *Portions of Santa Rosa, San Simeon, Pico, and Little Pico, Arroyo de la Cruz, Arroyo del Padre Juan, and San Carpoforo Creeks are anadromous fish streams which should be protected from impediments to steelhead migration and spawning. Adjacent riparian and wetland areas provide important wildlife habitat. Ground water and surface waters are linked, and maintenance of the creek habitats is essential to protect many coastal resources. These creeks support a number of declining species, such as the Tidewater Goby, Striped Garter Snake, Western Pond Turtle, Red-legged Frog, and Steelhead Trout.*

The following standards apply to development on lands within the Cambria Urban Reserve Line...

NCAP Planning Area Standard B.4(A): Limitation on Development. *Until such time as may be otherwise authorized through a coastal development permit approving a major public works project involving new potable water sources for Cambria, new development not using CCSD connections or water service commitments existing as of November 15, 2001 (including those recognized as "pipeline projects" by the Coastal Commission on December 12, 2002 in coastal development permits A-3-SLO-02-050 and A-3-SLO-02-073, shall assure no adverse impacts to Santa Rosa and San Simeon Creeks;*

NCAP Planning Area Standard B.4(B): Water Conservation Requirements. *Unless this requirement is otherwise modified through a coastal development permit authorizing a major public works water supply project for Cambria, **new development resulting in increased water use shall offset such increase through the retrofit of existing water fixtures within the Cambria Community Service District's service area, or through other verifiable actions to reduce existing water use in the service area (e.g. the replacement of irrigated landscaping with xeriscaping).** Accordingly, all coastal development permits authorizing such development shall be conditioned to require applicants to provide to the Planning Director (or the Coastal Commission Executive Director where applicable) for review and approval prior to construction, written evidence of compliance with CCSD Ordinance 1-98, as approved by the CCSD Board of Directors on January 26, 1998, and modified on November 14, 2002, and as codified in CCSD Code Chapter 4.20 in 2004; however, no retrofit credits may be obtained by extinguishing agricultural water use, or funding leak detection programs. Such permits shall also be conditioned to require written confirmation from the CCSD that any in-lieu fees collected from the applicant have been used to implement projects that have **reduced existing water use within the service area in an amount equal or greater to the anticipated water use of the project.** (emphasis added)*

The above NCAP Planning Area Standards are provided for the sake of reference because they were cited by the County in its approval, and because the Applicant has made assertions regarding the way in which he believes these policies allow him to be served by water despite limitations that otherwise apply (see Applicant's September 15, 2021 correspondence in Exhibit 6).³⁰ But as discussed above, the subject property is

³⁰ And to this point it is also noted that despite the Applicant's assertions in his September 15, 2021 letter that "the Coastal Commission, through its Staff, has revised the North Coast Area Plan to limit exempt properties", these NCAP provisions are the same as they have been since they were certified by the Commission in 2007. And while much has been learned since 2007 regarding the water supply context that affects the way the Commission must apply such policies, as described herein, these NCAP policies themselves are unchanged.

located outside the Cambria URL, and thus NCAP Planning Area Standards B.4(A) and (B) are not applicable to this project.³¹

Thus, the applicable LCP policies require that development be served by adequate services,³² including in terms of water supplies (Public Works Policy 1), and requires development that cannot be so served to be denied (CZLUO Section 23.04.430). The LCP also requires the long-term integrity of groundwater basins to be protected, prohibits extractions or other measures that exceed groundwater basin safe yields, and requires groundwater levels and surface flows to be maintained in such a way as to provide “optimum” habitat conditions (Coastal Watershed Policies 1 and 2). In addition, the LCP explicitly requires that Santa Rosa and San Simeon Creeks be protected against fisheries impediments, and recognizes their value otherwise, including the link between ground and surface waters as they relate to protection of creek-related resources, and including explicitly in relation to several sensitive species found in these two creek ecosystems (i.e., steelhead, goby and red-legged frog) (NCAP Combining Designations Policy 5).

Appeal Contentions

The appeals contend that the County-approved project is inconsistent with the above-cited LCP groundwater resources and water supply policies. Specifically, the appeals state that Cambria’s water supply is severely inadequate to serve even existing development, noting that the County did not determine that there was an adequate sustainable water supply to serve the project as is required by the LCP, but rather relied solely on a CCSD intent-to-serve (or “will serve”) letter. Further, because Cambria’s water supply is exclusively provided by San Simeon and Santa Rosa Creeks, which are already overdrafted and extracted at levels that have been found to impact associated sensitive habitats, the proposed project is inconsistent with the LCP’s ESHA policies. Finally, the appeals contend that the retrofits applied by the County are inadequate to offset the project’s future water demands, and that the project will lead to increased water use and further adverse impacts to the Creeks and their groundwater basins. The complete appeal documents are contained in **Exhibit 4**.

³¹ In any case, even if the project were to be located within the URL, these standards would not somehow provide the LCP override to approval that the Applicant asserts (see discussion above responding to the Applicant’s assertions for more details). On this point it is noted that these standards also weren’t applicable in the Applicant’s prior denied project adjacent to this site and also outside of the URL. And, even for recent projects considered by the Commission that were located inside the URL, these provisions were likewise insufficient to show adequate water for the types of reasons previously noted (see for, example, CDP Application A-3-SLO-20-0047 (Settimi SFD) denied by the Commission in November 2020, and see Appeals/CDP Applications A-3-SLO-17-0040 (Orellana), A-3-SLO-14-0044 (Fox), and 3-SLO-13-0351(Kingston Bay), all of which were withdrawn by the applicants prior to Commission hearings when faced with denial recommendations (due to similar water supply and ESHA issues as apply here)).

³² The Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood “adequate” services in relation to water to mean that a sustainable water supply exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts, and applies that understanding again in this case.

Analysis

The County approved this project based on the reasoning that: (1) the project qualifies to meet LCP water supply and creek protection provisions alternative water supply requirements per NCAP Planning Area Standards B.4(A) and (B) because it was a pre-2001 CCSD moratorium water service commitment project, including because the subject lot was created by a 1997 subdivision; (2) adequate public service capacities are available to serve the proposed development because the CCSD provided a will-serve letter; and 3) the project is conditioned to offset its water use through participation in the CCSD retrofit program. None of these reasons is sufficient to demonstrate that the project can be served by an adequate water supply, and all of them raise substantial LCP conformance issues.

In terms of the County's first reason, the County approved the project by finding it to be one of CCSD's pre-2001 moratorium water commitments, and relied on NCAP Planning Area Standards B.4(A) and (B) as a defacto "override" of the LCP's water supply requirements. There are numerous flaws and errors with the County's reasoning. For one thing, and as indicated above, those NCAP standards are actually inapplicable for this project. Those policies are only applicable to development within the Cambria URL. This project is outside of the URL³³ and is actually located in a rural, forested area. Thus, to the extent those provisions even provide a platform for certain types of projects to be approved notwithstanding Cambria's water inadequacies, which the Commission does not believe to be the case anyways, they are not the applicable standards of review for this project, and cannot form the basis of an approval. The County's inappropriate use of these LCP provisions in and of itself raises a substantial LCP conformance issue.

Even if these provisions were applicable to the project, the County's interpretation is flawed because it interprets these policies as an override provision that allows for certain pre-2001 projects to be approved regardless of whether an adequate water supply exists or not. This is not true. Public Works Policy 1, CZLUO Section 23.04.430, Coastal Watershed Policies 1 and 2, and NCAP Combining Designations Policy 5 still apply to such development (and Standard B.4(A) simply provides further protection of Santa Rosa and San Simeon Creeks by explicitly requiring another prerequisite to allowable development in certain cases if it were to have been applicable here). Namely that new development (other than those qualifying pre-2001 projects inside the URL) also is explicitly not allowed to adversely affect these two creeks. There are no provisions in the cited NCAP provisions that would suggest they override the other cited policies, and in fact they simply apply an additional level of protection in certain cases as described above. Further, if there was any question about how to understand these provisions, the Commission has not interpreted them the way the County has (as described above) and the Coastal Act would support the Commission's interpretation.³⁴

³³ And doesn't qualify for other reasons; see also discussion on this point above.

³⁴ Courts have previously found that LCP provisions must be understood in relation to the relevant Coastal Act section or sections from which a specific LCP provision derives its authority (again, see also *McAllister v. Coastal Commission* (2008) 169 Cal.App.4th 912). Coastal Act Sections 30230, 30231, and 30240, from which the above LCP policies derive their statutory authority, all evince an express intent to

Each would apply to a project within the URL (which this project, as noted above, is not). And even if NCAP Standard B.4(A) was interpreted to mean that certain projects could be approved without meeting other LCP requirements (which is not what it states), the project would then have to meet the requirements of NCAP Standard B.4(B), which it does not. Standard B.4(B) requires that water use from new development be offset, and at this time it has not been proven that retrofit requirements are actually able to provide true offsets.

In this case, there is not an adequate water supply to serve the project; and even existing extractions to serve even existing development in Cambria do not protect the long-term integrity of groundwater basins, do exceed groundwater basin safe yields, do not maintain groundwater levels and surface flows in such a way as to provide optimum habitat conditions, and do not protect Santa Rosa and San Simeon Creeks as is required, let alone allowing for more extractions to serve new development such as this. The County's approval is inconsistent with Public Works Policy 1, Coastal Watershed Policies 1 and 2, and NCAP Combining Designations Policy 5. These policies would require denial of the CDP for the project per CZLUO Section 23.04.430.

In addition, and as described above, even if some of these pre-CCSD moratorium projects that qualified under NCAP Standards B.4(A) and (B) were to exist today, and it does not appear that any do, such projects could not demonstrate that they could be served by adequate water, including through the use of water conservation/retrofits, under the LCP. As a result, currently the LCP effectively prohibits approval of new water service in Cambria, taking into account the actual facts and reality on the ground, including for this project regardless of its pre-CCSD moratorium status. And, at this time, 20 years after the moratorium was put in place, Cambria's water situation has only become more dire, and it is more clear now than ever that the degree of problems is even more substantial than even previously understood. CCSD appears to be currently extracting more water than is allowed under the terms and conditions of the Commission's CDP (and also under the SWRCB license), which is both a Coastal Act violation and leading to severe adverse creek impacts. The County, as the initial CDP decision-making body for CDP applications that include new water use in Cambria, needs to consider these perhaps inconvenient facts, and stop approving or even

provide maximum protection to creek resources such as these, including stating that "The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means...preventing depletion of ground water supplies and substantial interference with surface waterflow, ...maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams." And the Coastal Act is also clear that it is to be understood in the way that best achieves its objectives, stating that it "shall be liberally construed to accomplish its purposes and objectives" (Coastal Act Section 30009). Thus, the LCP needs to be read in a way that protects these creeks in any case, and not in a way that allows their degradation. To that point, it is clear that the LCP understanding being proffered by the Applicant (namely that the Applicant is "exempt from the Moratorium and the obligation to assure no adverse impacts on water resources" (see September 15, 2021 letter)) is simply inaccurate.

considering such projects³⁵ unless and until measurable steps are taken that improve water supply issues in Cambria.

As to the County's reasoning that the CCSD will-serve is sufficient to demonstrate adequacy of water, such reasoning ascribes analysis into the will-serve that clearly does not exist. As described above, it is clear from the facts that Cambria does not have an adequate water source to supply even existing users, let alone new water using development. In fact, just a few months ago, CCSD declared a Stage 4 Water Shortage Emergency, stating that, "the demands and requirements of water consumers cannot be satisfied without depleting the water supply of the CCSD to the extent that there would be insufficient water for human consumption, sanitation and fire protection" (see **Exhibit 5**). From its own declaration it is crystal clear to the CCSD that it lacks adequate water to serve even existing development in Cambria, let alone new users. It is not clear why the CCSD continues to provide will-serve letters in the face of such evidence.³⁶ Further, the County under the LCP is required to make its own finding that an adequate water supply is available to serve the proposed development, and cannot abrogate that responsibility to the CCSD. As described above, and as consistently found by the Commission in past LCP and CDP decisions, the facts are clear that Cambria simply does not have an adequate water supply. Neither the CCSD or the County has demonstrated otherwise. In sum, water supply conditions in Cambria remain in a state of emergency and have been for many years, and an adequate water supply has not yet been found (and what exists now is insufficient even for existing development).

And finally, as to the County's reasoning that participation in the CCSD retrofit program is somehow sufficient to show adequacy of water and appropriate offsets, there is simply not evidence to support such a finding. And in fact, the available evidence, as described in more detail above, points to the exact opposite.³⁷ As explained above, CCSD's retrofit program appears inadequate to ensure that even projects that can show an adequate water supply (which appears impossible at the current time) can in fact adequately offset water use as required by the LCP. This is not a new Commission observation, as evidenced by previous detailed findings in prior cases (including in

³⁵ The County should not be even accepting applications for development in Cambria that cannot show evidence of an adequate water supply. A will-serve letter does not provide such evidence (see also discussion below). The County is giving applicants a sense of 'false hope' when it does, and is doing a disservice to these applicants and the broader community. It is also leading to a significant number of appeals to, and subsequent CDP denials by, the Commission, each of which require an expenditure of scarce public resources to process.

³⁶ And, similar to the County, CCSD should not be providing such will serve letters. They appear to already be extracting water currently in excess of that allowed by the Commission's CDP, which is a Coastal Act violation, that is leading to severe ESHA impacts, including to listed sensitive species in Santa Rosa and San Simeon Creeks. CCSD is better served by looking at ways to avoid even its current level of water extraction, including so it can meet its CDP requirements, and looking at environmentally-sensitive ways to augment Cambria water supplies. As is, CCSD is doing a disservice to project applicants and the community for similar reasons as the County.

³⁷ And while CCSD is working on correcting retrofit program deficiencies, it remains to be seen whether the new program that is currently being formulated will actually be able to achieve measurable offsets when the LCP allows for same.

relation to the Applicant's prior project at an adjacent site that was denied by the Commission in 2019). CCSD's retrofit program should not be countenanced in LCP or CDP water supply adequacy decisions. Again, the program is only another of the many illusory elements relied upon by the County and CCSD to approve projects and issue will serves, respectfully, and it too does a disservice to applicants and the community.

2. ESHA

Applicable LCP Provisions

The LCP includes a robust policy framework to prevent adverse impacts to environmentally sensitive habitat areas (ESHA) including prohibiting development which could adversely impact significant resources. Significant ESHA resources occur within and around Cambria and include the San Simeon and Santa Rosa Creeks and their watersheds which support anadromous fish among other rare and threatened plant and animal species. And here, the entire 6.64-acre parcel that is the subject of this appeal is mapped as a sensitive resource area (SRA) and terrestrial habitat (TH) ESHA in the LCP (see **Exhibit 7**). The entire building envelope is sited within an area thick with native Monterey pine and supporting understory. Policies to protect these important resources include:

ESHA Policy 1: Land Uses Within or Adjacent to Environmentally Sensitive Habitats. *New development within or adjacent to locations of environmentally sensitive habitats (within 100 feet unless sites further removed would significantly disrupt the habitat) shall not significantly disrupt the resource. Within an existing resource, only those uses dependent on such resources shall be allowed within the area.*

ESHA Policy 2: Permit Requirement. *As a condition of permit approval, the applicant is required to demonstrate that there will be no significant impact on sensitive habitats and that proposed development or activities will be consistent with the biological continuance of the habitat. This shall include an evaluation of the site prepared by a qualified professional which provides: a) the maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures where appropriate. (emphasis added)*

ESHA Policy 29: Protection of Terrestrial Habitats. *Designated plant and wildlife habitats are environmentally sensitive habitat areas and emphasis for protection should be placed on the entire ecological community. Only uses dependent on the resource shall be permitted within the identified sensitive habitat portion of the site.*

ESHA Policy 35: Protection of Vegetation. *Vegetation which is rare or endangered or serves as cover for endangered wildlife shall be protected against any significant disruption of habitat value. All development shall be designed to disturb the minimum amount possible of wildlife or plant habitat.*

NCAP Combining Designations Policy 4: Monterey Pine Forests. ... These stands are extremely important as a "gene pool," due to genetic variations found there that protect some trees from pine pitch canker, a disease that is causing rapid loss of Monterey pine trees. Relatively undisturbed stands occur on the Cambria fringe area and in isolated pockets to the north. Monterey pine forests cover most of the Cambria Urban Area. The larger remaining stands in undeveloped areas should be retained intact as much as possible, by designing cluster development at very low densities in open areas or areas of sparse tree cover. Preservation of finer specimen stands is recommended through the use of open space easements, avoidance by development, and direct purchase. ...

With respect to creeks and associated riparian areas, both are recognized as ESHA in the LCP. LCP Coastal Watersheds policies also require protection of the long-term integrity of groundwater basins and prohibits extractions that adversely affect coastal waters. These policies include:

IP Sections 23.07.174: Streams and Riparian Vegetation. Coastal streams and adjacent riparian areas are environmentally sensitive habitats. The provisions of this section are intended to preserve and protect the natural hydrological system and ecological functions of coastal streams.

Coastal Watersheds Policy 1: Preservation of Groundwater Basins. The long-term integrity of groundwater basins within the coastal zone shall be protected. **The safe yield of the groundwater basin, including return and retained water, shall not be exceeded** except as part of a conjunctive use or resource management program which assures that the biological productivity of aquatic habitats are not significantly adversely impacted.

Coastal Watersheds Policy 2: Water Extractions. Extractions, impoundments and other water resource developments shall obtain all necessary county and/or state permits. All pertinent information on these uses (including water conservation opportunities and impacts on in-stream beneficial uses) will be incorporated into the data base for the Resource Management System and shall be supplemented by all available private and public water resources studies available. **Groundwater levels and surface flows shall be maintained to ensure that 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.** (emphasis added)

NCAP Combining Designations Policy 5: North Coast Creeks. Portions of Santa Rosa, San Simeon, Pico, and Little Pico, Arroyo de la Cruz, Arroyo del Padre Juan, and San Carpoforo Creeks are anadromous fish streams which should be protected from impediments to steelhead migration and spawning. Adjacent riparian and wetland areas provide important wildlife habitat. Ground water and surface waters are linked, and maintenance of the creek habitats is essential to protect many coastal resources. These creeks support a number of

declining species, such as the Tidewater Goby, Striped Garter Snake, Western Pond Turtle, Red-legged Frog, and Steelhead Trout.

Analysis

The appeals contend that the County's approval will further degrade ESHA, including both the sensitive Santa Rosa and San Simeon Creek systems from over extraction but also the sensitive Monterey pine forest and its habitat that is present on the property.

Creek ESHA Impacts

With respect to the creeks, numerous studies have been completed regarding the health of these ecosystems. The most recent significant study dates from 2014,³⁸ at which time scientists found that both Creeks' instream flows in the summer of 2013³⁹ were inadequate to meet even the bare minimum necessary to maintain aquatic habitat systems, despite the fact that the terms and conditions of the 1977 CDP and the SWRCB water licenses only allow water extractions if the CCSD simultaneously ensures there is adequate stream flow in order to protect fisheries and other riparian habitat resources. The study states that Environmental Water Demand (EWD) is only the "minimum values to maintain aquatic systems and should not be interpreted as "enough" water to support long-term, sustainable steelhead populations or the complex ecosystems in which they live." The study found that the observed instream water flows were inadequate to meet the Creeks' estimated required EWDs to support steelhead (which the study used as the primary indicator species). To illustrate, in lower Santa Rosa Creek, the estimated spring EWD was 3.0 cubic feet per second (cfs); however, the actual observed EWD was only 1.62 cfs. Lower Santa Rosa Creek's estimated summer EWD was 0.75 cfs, but the observed EWD was 0.0 cfs (meaning wetted with no water velocity). San Simeon Creek's estimated EWD for the spring was 1.5 cfs; however, only 0.99 cfs was observed. Thus, the instream flows in both Creeks were well below the minimum necessary to maintain aquatic systems, and these habitat impacts are explicitly prohibited by both CCSD's SWRCB water licenses as well as the Commission's CDP to the CCSD recognizing same.

The study expressed particular concern for Santa Rosa Creek, which had no flow in the summer of 2013, rendering the creek incapable of providing steelhead habitat during that time.⁴⁰ The study further found that the Santa Rosa Creek lagoon conditions were

³⁸ "San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study)", prepared by Stillwater Sciences for the Coastal San Luis Resource Conservation District (January 2014).

³⁹ In 2013 CCSD extracted 593 af of water from San Simeon creek and 140 af of water from Santa Rosa creek, for a total of 733 af.

⁴⁰ Again, as described above, in approving the CDP for CCSD's creek withdrawals, the Commission found that Santa Rosa Creek is "the most important anadromous fish stream in San Luis Obispo County" and therefore required CCSD to discontinue its use of wells along Santa Rosa Creek as its primary water supply once the San Simeon Creek wells were established. Thus the CDP only allows withdrawals from the Santa Rosa Creek wells if necessary to supplement CCSD's water supply in an emergency if/when water cannot be safely removed from San Simeon Creek. Notwithstanding this CDP requirement and limitation, according to CCSD's records, water withdrawals from Santa Rosa Creek have occurred every year except one since 1988 (and records provided only go back to 1988, so it could not be verified before

“worsened by low stream flows resulting from excessive groundwater pumping and diversions[.]” The study further explained that “[r]educed freshwater inflows result in water temperatures and dissolved oxygen levels in the lagoon, particularly at the bottom, that can frequently exceed lethal limits for steelhead in the summer and the fall,” and that “entire sections of the lower lagoon dried up, reducing the area of suitable steelhead rearing habitat.” And “When Santa Rosa Creek lagoon inflows ceased entirely in summer 2013, steelhead (adults and presumably juveniles) were observed trapped in a pool that decreased dramatically in extent and water quality.” Similar conclusions regarding the adverse impacts of existing groundwater extractions were also reached in the California Department of Fish and Wildlife’s February 2012 “Santa Rosa Creek Watershed Management Plan” and National Marine Fisheries Service December 2013 “South-Central California Steelhead Recovery Plan”.

It should be noted that CCSD has been and continues to extract water at levels above the 2013 extraction levels (593 af for San Simeon creek and 140 af for Santa Rosa creek) which resulted in inadequate instream flows to maintain aquatic habitats. Since 1988, there have been 16 instances where CCSD has extracted more than 593 af of water from San Simeon Creek and 13 instances where CCSD has extracted more than 140 af of water from Santa Rosa Creek. And since 2013, when it was determined that both Creeks had instream flow levels inadequate to maintain aquatic habitats, CCSD has extracted over 140 af of water from Santa Rosa Creek six times.

In sum, the most recent scientific studies each independently demonstrate that CCSD’s existing water extractions to serve even existing development have adverse impacts to the Creeks and there is inadequate water to sustain the Creeks’ sensitive riparian habitats. Thus, available evidence would suggest that until a new water supply is secured, and/or existing water extractions are dramatically decreased, any and all new water service to new development in Cambria will be unable to demonstrate that the proposed development will not adversely impact the Creeks. Rather, the obvious conclusion is that new development, such as the County-approved project, will adversely affect the Creeks, which is not allowed by the LCP.

In this case, even current extractions to serve existing development in Cambria do not protect the long-term integrity of groundwater basins, do exceed groundwater basin safe yields, and do not maintain groundwater levels and surface flows in such a way as to provide minimum (much less optimum) habitat conditions, and do not protect Santa Rosa and San Simeon Creeks as is required, even without allowing more extractions to serve new development such as this. All of this is inconsistent with Coastal Watershed Policies 1 and 2, and NCAP Combining Designations Policy 5. In addition, ESHA Policy 2 explicitly demands that “the applicant is required to demonstrate that there will be no significant impact on sensitive habitats and that proposed development or activities will be consistent with the biological continuance of the habitat.” Here, no such demonstration has been made in relation to the San Simeon and Santa Rosa Creeks, and indeed the available evidence suggests that it cannot be made, even with retrofits

then). And, as described, such withdrawals are only allowed where these fishery habitats are protected and the viability of riparian habitat is ensured via supplemental irrigation.

(even if they were applicable to this proposed project, which they aren't—see also above Water Supply section for more details). Indeed, as opposed to making such a demonstration, the Applicant here explicitly suggests instead that the Applicant is “exempt from the Moratorium and the obligation to assure no adverse impacts on water resources” (see September 15, 2021 letter), which is both not true and the opposite of what LCP ESHA Policy 2 requires. The County-approved project is thus also inconsistent with ESHA Policy 2.

Monterey Pine Forest ESHA Impacts

Monterey pine is the most widely planted pine tree in the world and is of great economic importance as a plantation species, forming the basis for a lumber and paper industry of world importance (e.g., in New Zealand, Chile, Australia, Spain, South Africa, Argentina, Uruguay, and Kenya). As a commercial species, Monterey pine trees can be found around the globe in great numbers; it has been estimated that there are some 10 million acres of plantation Monterey pine trees overall, primarily in the southern hemisphere. Notwithstanding this global distribution of the Monterey pine *tree*, though, *native* Monterey pine *forest* is extremely limited in distribution. In fact, although widely distributed along the California coast in the Pleistocene age, Cambria is home to one of only three remaining populations of native Monterey pine forest in California (and one of only four in the world).⁴¹

As the southernmost stand in California, this native Monterey pine forest occupies roughly 2,300 acres in and around Cambria (making it the second largest such forest stand globally),⁴² with most of the remaining intact stand of native Monterey pine forest located north and east of town, with some smaller intact stand patches further south. The native Monterey pine forest is a unique natural ecosystem containing a rare assemblage of plants and animals that have co-evolved over millennia. Although not listed formally under the State or Federal Endangered Species Acts,⁴³ native Monterey pine forest has been identified by both the California Department of Fish and Wildlife and the California Native Plant Society (CNPS) as a rare and threatened natural resource.⁴⁴ The LCP recognizes this context, and includes provisions to protect native

⁴¹ In addition to native Monterey pine forest stands in three coastal areas in California (at Año Nuevo, Cambria, and the Monterey peninsula), there exist smaller native Monterey pine forest stands on two Mexican islands off the coast of Baja California (the Guadalupe and Cedros Islands).

⁴² At over 9,000 acres, the Monterey peninsula native Monterey pine forest stand is the largest such native forest in the world.

⁴³ CNPS submitted a petition to the State Fish and Game Commission in August 1999 to list Monterey pine as a Threatened Species under the California Endangered Species Act. The petition was withdrawn in part to address the large volume of comments received on it and it has not been resubmitted.

⁴⁴ CDFW's Natural Diversity Database (CNDDB) classifies native Monterey pine forest with a G1 global rank and an S1.1 state rank, indicating that both globally and within California there are fewer than six viable “element occurrences” (G1 and S1) and that it is considered “very threatened” (S1.1), and designates native Monterey pine forest as a rare community type. CNPS classifies Monterey pine as 1B.1, where the “1B” indicates that the species is considered “rare, threatened, or endangered in California and elsewhere,” and the “0.1” modifier indicates that it is considered “seriously endangered in California (over 80% of occurrences threatened/high degree and immediacy of threat).”

Monterey pine forest, including through a Terrestrial Habitat (TH) designation that applies to most of Cambria due to the presence of the native Monterey pine forest, including to over half of the subject site. The entire property and building envelope is within native Monterey Pine forest and is mapped ESHA under the LCP (see **Exhibit 7**).

The County-approved project will result in about 1.4 acres of site disturbance, including disturbing about 0.6 acres of native Monterey pine forest, and requiring the removal of some 70 pine trees. Despite the site's protected LCP ESHA status, the County did not undertake an ESHA analysis and provided zero supporting documentation to support a finding that the project is consistent with the LCP's ESHA provisions related to native Monterey pine forest. It is not. In fact, the residential use proposed is not a resource-dependent use and thus is prohibited in ESHA by ESHA Policies 1 and 29.

Furthermore, the Applicant has not demonstrated "that there will be no significant impact on sensitive habitats and that proposed development or activities will be consistent with the biological continuance of the habitat" as is required by ESHA Policy 2 and therefore this the project is also inconsistent that policy. Further, 1.4 acres of disturbance, over half of which is disturbance to LCP-designated ESHA, including native Monterey pine forest and the removal of 70 pine trees, constitutes a significant ESHA disruption, which is prohibited by ESHA Policies 1 and 35. In short, all evidence points to the County approved project being inconsistent with the LCP as it relates to ESHA protection.

3. The "Five Substantial Issue" Factors

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over the CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance. Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue: 1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP; 2) the extent and scope of the development as approved or denied by the local government; 3) the significance of the coastal resources affected by the decision; 4) the precedential value of the local government's decision for future interpretations 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, and may find substantial issues for other reasons. In this case, these five factors, considered together, support a conclusion that the County's approval of CDP for this project does raise substantial LCP conformance issues.

Here, the first factor weighs heavily in favor of finding substantial issue because the County's decision lacks factual and legal support to find that the development is consistent with the LCP. The County's approval is clearly inconsistent with Public Works Policy 1, which requires that development be served by adequate services, including in terms of water supplies, and requires development that cannot be so

served to be denied (CZLUO Section 23.04.430). Additionally, even the current level of CCSD water extraction is inconsistent with the terms and conditions of the Commission's CDP and the SWRCB water licenses which only allow water extractions if the CCSD simultaneously ensures there is adequate instream flow in order to protect fisheries and other riparian habitat resources (where supplemental irrigation is also required for the latter). To this point, the approval is also inconsistent with multiple LCP Coastal Watershed and ESHA policies, which require: 1) no significant impacts to sensitive habitats, such as coastal streams, watersheds, and riparian areas; 2) that stream flows are maintained at levels optimum for marine organisms; and 3) the preservation of the groundwater basin. Further, the County's approval of extensive development in native Monterey pine forest ESHA without any ESHA analysis clearly lacks any factual or legal support whatsoever. In addition, NCAP Standards B.4(A) and (B) are inapplicable for this project because the site is located outside of the URL and the County's use of them as the standard of review (much less as an unwarranted override of other LCP policies) also lacks legal and factual support. Given the fact that the most basic finding of an adequate water supply cannot be found, water use is currently exceeding allowable levels, the wrong standard of review was used, and development will adversely affect coastal stream and native Monterey pine forest ESHA, the Commission finds that the first factor weighs heavily in support of finding substantial issue. The local government's decision is inconsistent with the certified LCP in a number of ways and this factor alone would justify finding substantial issue.

Regarding the second factor, at first blush the extent and scope of the development as approved by the County are not that large since it's a single-family dwelling (albeit a fairly large such dwelling with significant associated structures and related development) with some associated development. However, in the context of the water issues and considering that the development is within native Monterey pine forest ESHA, the extent and scope are larger than might otherwise be the case in a different context. Overall, the extent and scope of development here weigh in support of finding a substantial issue.

Regarding the third factor, the coastal resources affected by the County's approval are significant. The proposed project is located in an area where the depletion of groundwater adversely affects significant coastal resources, including Santa Rosa and San Simeon Creeks and associated sensitive riparian habitats. Per the LCP, Santa Rosa and San Simeon Creeks are, in and of themselves, ESHA. These Creeks support a number of threatened and endangered species, and Santa Rosa Creek has been found in the past by the Commission to be the most significant habitat for anadromous fish in San Luis Obispo County. Furthermore, the significance of these Creeks as coastal resources is also because these are the only sources of water availability for development within the Cambria community. Additionally, the development will directly affect native Monterey pine forest ESHA, which is extremely rare and significant coastal resource. Therefore, this factor heavily supports a finding of substantial issue.

Regarding the fourth factor, the precedential value of the County's decision is high. The project raises such coastal resource protection concerns, including interpreting the LCP to allow for new water use in an area with a severe water shortage as LCP

consistent merely by reliance on a CCSD will serve letter and retrofit offsets (of unproven efficacy), and including allowing prohibited non-resource dependent development in LCP-designated ESHA without any analysis or LCP support for same. It would also set a precedent of erroneously applying policies limited to the URL outside of it. These interpretations are facially unreasonable and would clearly have a significant precedential value to future interpretations of the LCP. Therefore, the fourth factor also heavily supports a finding of substantial issue.

Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to statewide concerns regarding water resources, the importance of groundwater resources in San Luis Obispo County, and growth and development issues in Cambria and the County more broadly in an area of severe regional water supply shortage. In addition, the project raises important regional issues related to native Monterey pine forest ESHA since such habitat is rare and threatened (with the forest here being one of only three native stands left in the United States, and one of four left in the world). This factor also heavily supports a finding of substantial issue.

4. Substantial Issue Determination Conclusion

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

As described above, the findings demonstrate, including the five factors weigh heavily toward, a finding of substantial issue. Accordingly, the Commission finds that Appeal Number A-3-SLO-21-0065 raises substantial LCP conformance issues in terms water supply and ESHA. Therefore, the Commission finds that **a substantial issue** exists with respect to the County-approved project's conformance with the certified San Luis Obispo County LCP and takes jurisdiction over the CDP application for the proposed project.

F. Coastal Development Permit Determination

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

1. Project is Inconsistent with the LCP Requiring Denial

Water Supply/Creek Protection

As described in the "Substantial Issue Determination" section above, the Commission finds the project inconsistent with the San Luis Obispo County certified LCP for the same reasons that the Commission determined the project raised a substantial issue: namely, the project does not have an adequate water supply, it is an impermissible use

in ESHA, and it results in impermissible adverse ESHA impacts (to Santa Rosa and San Simeon Creeks, and to native Monterey pine forest).

As described earlier, with respect to water supply, CZLUO Section 23.04.430 prohibits approval of new development unless it has been demonstrated that an adequate water supply is available to serve the proposed development per Public Works Policy 1. The Commission, in previous appeals, has consistently interpreted Section 23.04.430's water supply adequacy requirement as meaning that the community has a water supply capable of serving proposed new development in a manner that is consistent with the LCP's protection of coastal resources and coastal priority uses.⁴⁵ Thus, Section 23.04.430 must be read in conjunction with other relevant LCP policies pertaining to the protection of such coastal resources as sensitive riparian habitats, groundwater aquifers, wetlands, and lagoons – and in particular here, Santa Rosa and San Simeon Creeks. As noted above (and concluded in multiple studies, with the most recent being in 2014) instream flows in the summer of 2013 were inadequate to meet even the bare minimum necessary to maintain aquatic habitat systems. This is despite the fact that the terms and conditions of the Commission's 1977 CDP and the SWRCB water licenses only allow water extractions if the CCSD simultaneously ensures there is adequate stream flow in order to protect fisheries and other riparian habitat resources. Additionally, approval of this project is inconsistent with Coastal Watershed Policy 2 which requires that, "[g]roundwater levels and surface flows shall be maintained to ensure that 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". In addition, NCAP Planning Area Standard 4B.(A) and (B) do not apply here, since the project site is located outside of the Cambria URL (and even if the project so qualified, that would not allow it to be approved consistent with the LCP).

In sum, there is not an adequate water supply to serve the project; and even existing extractions to serve even existing development in Cambria do not protect the long-term integrity of groundwater basins, do exceed groundwater basin safe yields, do not maintain groundwater levels and surface flows in such a way as to provide optimum habitat conditions, and do not protect Santa Rosa and San Simeon Creeks as is required,⁴⁶ let alone allowing for more extractions to serve new development such as this. The County's approval is inconsistent with Public Works Policy 1, Coastal Watershed Policies 1 and 2, and NCAP Combining Designations Policy 5. As such, the project must be denied.

Other ESHA

Moreover, the proposed project is inconsistent with ESHA policies which protect the rare and threatened native Monterey pine forest, which is found on this site. The project proposes extensive residential development, including a residence and ancillary development (e.g., decks, garage, etc.) of some nearly 5,000 square feet as well as a

⁴⁵ See, for example, A-3-SLO-01-122 (Cambria Pines Lodge Expansion); A-3-SLO-02-073 (Hudzinski SFD); A-3-SLO-03-050 (Monaco SFD); and A-3-SLO-04-048 (Berge CCOC).

⁴⁶ See, for example, *SLO Instream Flow Study*; *Santa Rosa Creek Watershed Management Plan*; *South-Central California Steelhead Recovery Plan*.

driveway and other related development, totaling some 1.4 acres of site disturbance (including 0.6 acres entirely within intact native Monterey pine forest), requiring the removal of some 70 pine trees. Such proposed residential development is inconsistent with the LCP's ESHA provisions related to Monterey pine forest, including ESHA Policies 1 and 29 require that development within ESHA be limited to resource dependent uses that do not significantly disrupt this sensitive habitat. In fact, the residential use proposed is not a resource-dependent use and thus is prohibited. Further, the proposed development cannot be found consistent with ESHA Policy 2's requirement to demonstrate "that there will be no significant impact on sensitive habitats and that proposed development or activities will be consistent with the biological continuance of the habitat" or with ESHA Policy 35's requirement that development disturbs the minimum amount of rare or protected vegetation. Thus, the project cannot be found consistent with the LCP requirements regarding native Monterey pine forest ESHA, and the project must be denied on this basis as well.

Unless and until Cambria solves its water supply problem and there is adequate water to serve existing and new development in a manner that does not adversely impact coastal resources, new water service to serve new development is simply not LCP compliant. Additionally, the project is not approvable because it is inconsistent with ESHA Policies 1, 2, 29 and 35 because the project is: 1) a non-resource dependent use within ESHA; 2) will disturb significant native Monterey pine forest habitat; and 3) is not sited to disturb the least amount of significant habitat possible. As such, denial in this case is required by the LCP.

Violation

Violations of the Coastal Act exist on the subject property including, but not limited to, the installation of a water meter and associated infrastructure without Coastal Act or LCP authorization and using potable water supplied by the CCSD for irrigation and erosion control on the subject property. These violations are the subject of Commission Violation File Number V-3-21-0108.

In addition, the CCSD is in violation of the terms and conditions of CDP No.132-18, granted by the Commission on August 12, 1977, which authorized rehabilitation of Cambria's water distribution system, including by drilling water wells in the San Simeon Creek water basin. CDP No. 132-18 requires the CCSD to maintain water quality and stream flows in lower San Simeon Creek to protect the biological productivity of the creek and the lagoon. However, Cambria's water distribution system is currently over-subscribed and stream flows in San Simeon Creek, including to the lagoon, regularly are not maintained as required. This violation is the subject of Commission Violation File No. V-3-21-0105.

Finally, the Commission has not located evidence that the County's CDP approval of the original 1997 subdivision that created the lot that is the subject of this appeal was ever noticed to the Commission—as is required for County CDP approvals. Approval of a CDP for a subdivision at this location would have been an appealable County action and would have been subject to the Commission's 10 working day appeal period upon

receipt of a non-deficient final local action notice (FLAN) of such County action. Unless and until it can be proven that the Commission received notice and that the 10-day appeal period passed without an appeal, the County's 1997 CDP action cannot be considered effective. Thus, the lots created by the subdivision would not have been legally created and any development undertaken thereon would be considered development without benefit of a CDP—a Coastal Act/LCP violation. Commission staff continue to investigate this matter⁴⁷.

Although development has taken place without Coastal Act/LCP authorization, review of the appeal of the County's approval of County CDP DRC2019-00214, and review of the CDP application itself following a finding of substantial issue, has been based solely upon the facts and evidence, including in terms of the legally established baseline for such a review, as compared to the requirements and provisions of the San Luis Obispo County LCP. The finding of substantial issue or the *de novo* conclusion are not based in any way upon the lack of a FLAN for the subdivision (described above).

CDP Determination Conclusion

As discussed above, the proposed project is inconsistent with the LCP's provisions that require new development to ensure that adequate water is available to serve the project and that the project will not have adverse impacts to environmentally sensitive habitat areas, including Santa Rosa and San Simeon Creeks and Monterey pine forest. Thus the project must be denied. Typically, the proposed project would be evaluated for consistency with other relevant LCP policies and standards, such as those related to visual resources, tree removal, 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 inconsistencies with the LCP's groundwater resources, water supply, and ESHA policies, these issues are not evaluated in this *de novo* review.

2. 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

⁴⁷ The project site was part of a 1997 subdivision that created 18 separate lots. Because the subdivision was outside of the CCSD's designated service boundaries, the district would not provide the parcels with intent-to-serve letters at the time the subdivision was approved by the County. Following the initiation of litigation by the then-owner of the subdivided property (the Walter H. Leimert Company), CCSD and the property owner entered into a settlement agreement that required two primary things: 1) the Leimert Company to install water meters and associated infrastructure to the 18 lots; and 2) CCSD to provide intent-to-serve letters for the 18 newly created lots in exchange for the payment of connection fees and the conveyance to CCSD of fee title for four lots located elsewhere in Cambria. To the extent that the Applicant or CCSD might argue that the subdivision/water meter/associated infrastructure is allowable pursuant to the Settlement Agreement between "Cambria West" and the Cambria Community Services District dated July 12, 1999, please note that the Commission was not a party to the Settlement Agreement and the development described in this staff report still requires a CDP. A settlement agreement between third parties does not affect the need for a CDP or somehow exempt such development from Coastal Act/LCP requirements.

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

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

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

The remainder of this section evaluates whether, for purposes of compliance with Section 30010, denial of the proposed project could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not, because the takings claim is not yet ripe, and denial of the project is due to the factual circumstance of lack of adequate water, rather than a regulatory prohibition.

General Principles of Takings Law

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."⁴⁸ 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 (see *San*

⁴⁸ 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).

Remo Hotel v City and County of San Francisco (2002) 27 Cal. 4th 643, 664.). The “damaging private property” clause in the California Constitution is not relevant to the current analysis. Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The United States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property (see *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 (“*Pennsylvania Coal*”)) [stating “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”)]. Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). The first category consists of those cases in which government authorizes a physical occupation of property (see *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 (see *Yee*, 503 U.S. at 522-523). Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (see *Keystone Bituminous Coal Ass’n v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). Here, because the current development proposal does not involve physical occupation of the Applicant’s property by the Commission, the Commission’s actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.* at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” (*Id.* at 1017-1018 (*emphasis* in original); *Riverside Bayview Homes*, (1985) 474 U.S. 121, 126 (regulatory takings occur only under “extreme circumstances.”⁴⁹).

The second circumstance in which a regulatory taking might occur is under the multi-part, *ad hoc* test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires at a minimum an examination into the character of the government action, its economic impact, and its

⁴⁹ 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 (see *Lucas, supra*, 505 U.S. at pp. 1029).

interference with reasonable, investment-backed expectations (*Id.* at 124; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *Id.* at 632 (rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*)).

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property (see *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 (see *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” (see *Id.* at 1454). Relying on U.S. Supreme Court precedence, the Ninth Circuit has acknowledged that at least one “meaningful application” must be made before the futility exception may apply, and “[a] ‘meaningful application’ does not include a request for exceedingly grandiose development” (*Id.* at 1455). Furthermore, the Ninth Circuit has suggested that rejection of a sufficient number of reapplications may be necessary to trigger the futility exception (*Id.* at 1454-55).

Commission’s Denial Would Not Result in a Regulatory Taking

The Commission’s denial of the proposed project would not result in a regulatory taking because any such claim is premature and denial of the project is due to the factual circumstance of lack of adequate water, rather than a regulatory prohibition. As analyzed above, application of CZLUO Section 23.04.430 requires denial of the proposed development on the grounds that Cambria lacks sufficient water supply and even existing water extractions have known adverse impacts to San Simeon and Santa Rosa Creeks that are prohibited by the LCP. Thus, although it could be potentially argued that the regulation results in an unconstitutional taking of the Applicant’s private property, based on the law and facts analyzed below, it is unlikely that such a temporary denial of development due to the present factual circumstances (which are subject to change, and thus might allow for project approval of some type, if it could be made to meet other applicable LCP provisions) would constitute an unconstitutional taking in this case.

At this time, application of Public Works Policy 1, CZLUO Section 23.04.430, and Coastal Watersheds Policies 1 and 2 have the practical effect of a moratorium on new development in Cambria that requires new water service. The United States Supreme Court has upheld certain development moratoriums when challenged on the basis of a regulatory takings (see *Tahoe-Sierra Preservation Council, Inc., et. al. v. Tahoe Regional Planning Agency et. al.*, (2002) 535 U.S. 302 (*Tahoe-Sierra*)). In the *Tahoe-Sierra* case, the Court reasoned that, “Logically, a fee simple estate cannot be rendered

valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted” (*Id.* at 332). The Court also explained that land use planners widely use moratoriums to preserve the status quo while formulating a more permanent development strategy (*Id.* at 337). “In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development” (*Id.* at 337-38). Here, the cited LCP water supply and related creek protection provisions have the effect of a temporary prohibition on economic use, and as soon as the water supply is adequate and adequately protective of creek resources the prohibition would be deemed lifted. Moreover, Public Works Policy 1, CZLUO Section 23.04.430, and Coastal Watersheds Policies 1 and 2 are essential components of a comprehensive LCP planning tool that ensures that growth in Cambria is efficient and sustainable, not exceeding the community’s resource carrying capacity. It also ensures the protection of significant resources, such as sensitive riparian habitat, and is intended to protect groundwater aquifers from adverse impacts such as seawater intrusion and subsidence. Thus, Public Works Policy 1, CZLUO Section 23.04.430, and Coastal Watersheds Policies 1 and 2, as “interim development controls”, ensure successful development which does not run afoul of takings concerns, as recognized by *Tahoe-Sierra*.

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

In context of the legal authorities discussed above, any claim of a taking at this time would be premature at this time because the Commission’s denial of the proposed development is not a “final and authoritative determination” of the effect of Public Works Policy 1, CZLUO Section 23.04.430, Coastal Watersheds Policies 1 and 2, and other relevant LCP policies on the proposed development, as the proposed development *could* be found consistent with the LCP provisions if the factual circumstances change so as to support the necessary findings. As recognized in *Tahoe-Sierra*, the Applicant’s

property is not rendered valueless due to the temporary, *de-facto* moratorium on new water using development due to lack of adequate water, and such moratoria as interim development controls are valid planning tools. Moreover, as recognized in *Pratt*, it is the factual circumstance of lack of adequate water that warrants denial of the proposed development of this time, rather than the regulatory nature of the applicable LCP provisions. In other words, if and when the factual circumstances change such that a finding can be made that adequate water supply exists for the proposed development, then the project would be able to be found consistent with the relevant LCP water supply and related provisions.

In sum, it is unlikely that the Commission's decision to deny a CDP for the proposed development, on the grounds that the proposed development is inconsistent with Public Works Policy 1, CZLUO Section 23.04.430, Coastal Watersheds Policies 1 and 2, and ESHA Policies 1, 2, 29, and 35 considering the facts and evidence in the record, would result in an unconstitutional taking. Although the regulation's effect is a *de facto* moratorium on new development requiring new water service in Cambria at this time, this effect of the regulation is temporary in nature and caused by the factual circumstance of insufficient water resources in Cambria.

3. California Environmental Quality Act (CEQA)

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

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

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

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

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

Pursuant to CEQA Guidelines (14 CCR) Section 15042 "a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." Section

21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project was approved as proposed. Accordingly, the Commission's denial of the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

3. APPENDICES

A. Substantive File Documents⁵⁰

- File for Coastal Development Permit Appeal Number A-3-SLO-21-0066
- *"Water Use Efficiency Plan,"* Cambria Community Services District. February 21, 2013.
- *"Groundwater Management Plan,"* Cambria Community Services District. November 19, 2015.
- *"Issuance of Water Right Licenses 13916 and 13917,"* State Water Resources Control Board. March 14, 2019.
- *"Cambria's Emergency Water Supply Project: Questions and Answers,"* Cambria Community Services District. November 3, 2014.
- *"San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study),"* January 2014.
- *"Santa Rosa Creek Watershed Management Plan,"* California Department of Fish and Wildlife. February 2012.
- *"South-Central California Steelhead Recovery Plan,"* National Marine Fisheries Service. December 2013.

B. Staff Contact with Agencies and Groups

- San Luis Obispo County Planning and Building Department
- Cambria Community Services District

⁵⁰ These documents are available for review in the Commission's Central Coast District office.