

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV



F16a

Filed: 10/17/2017
Action Deadline: None
Staff: Brian O'Neill - SC
Staff Report: 1/22/2021
Hearing Date: 2/12/2021

STAFF REPORT SUBSTANTIAL ISSUE & DE NOVO HEARING

Application Number: A-3-SLO-17-0062

Applicants: Rob and Judy McCarthy¹

Appellants: Commissioners Erik Howell and Aaron Peskin; Tarren Collins

Local Government: San Luis Obispo County

Local Decision: San Luis Obispo County Coastal Development Permit Application Number DRC2014-00072, approved by the San Luis Obispo County Board of Supervisors on September 19, 2017.

Project Location: Two undeveloped parcels totaling some 63 acres on the north side of Cave Landing Road and flanking Ontario Ridge, between Avila Beach and Pismo Beach in San Luis Obispo County (APNs 076-231-060 and 076-231-063).

Project Description: Relocation of portions of an existing public access pedestrian easement and trail (the "Ontario Ridge Trail") from APN 076-231-063 (the McCarthy property) to the adjacent APN 076-231-060 (the Palm Finance property); extinguishment of the easement on the McCarthy property and creation of a new 20-foot-wide public access pedestrian easement on the Palm Finance property; and construction of

¹ San Miguelito Partners previously owned one of the undeveloped lots (APN 076-231-060) involved in the project and was a co-applicant during the County's approval process. However, that property is now owned by the Palm Finance Corporation. Palm Finance Corporation has declined to be a co-applicant for the project.

a 5-foot-wide public trail within the relocated easement and associated improvements (e.g., fencing, signage, gates, benches, etc.) in the Ontario Ridge/Pirates Cove area just downcoast from the unincorporated community of Avila Beach and upcoast from the City of Pismo Beach.

Staff Recommendation: Substantial Issue Exists; Denial

IMPORTANT HEARING PROCEDURAL 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 those time limits). Only the Applicant, aggrieved persons, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing, and 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 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 relocation of portions of an existing County-held public access easement and pedestrian trail (the "Ontario Ridge Trail") from APN 076-231-063 (the McCarthy property) to the adjacent APN 076-231-060 (the Palm Finance Corporation property). The County's approval also includes extinguishment of the easement on the McCarthy property and creation of a new 20-foot-wide public access easement on the Palm Finance Corporation property; construction of a 5-foot-wide public trail within the relocated easement; and associated development (e.g., fencing, signage, gates, benches, etc.). The project site is located in the Ontario Ridge/Pirates Cove area just downcoast from the unincorporated community of Avila Beach and upcoast from the City of Pismo Beach.

The appeals contend that the County's action is inconsistent with numerous policies and standards of the Coastal Act and the County's certified Local Coastal Program (LCP), including primarily those related to public access and recreation, public rights, visual resources, archaeological resources, sensitive habitats, and geological hazards. 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 with respect to the above issues, that the Commission take jurisdiction over the CDP application, and that the Commission deny that CDP application due to significant Coastal Act and LCP inconsistencies.

As a threshold matter, the Applicants have provided no evidence to demonstrate that they either own the Palm Finance Corporation property or have legal authorization from the property owner to implement and construct the project there. In fact, staff reached out to Palm Finance Corporation representatives who have declined to become a co-applicant on the project. Thus, it does not appear that the Applicants have the legal authority to move forward with the project at this time. In addition, the County-approved project would prohibit the public from using the existing trail and easement on the McCarthy property by completely removing the trail and extinguishing the easement, which is in direct conflict with a 2014 Commission Cease and Desist Order prohibiting same. The Commission's findings in that action also indicate that the County easement is most likely not the sole basis for a possessory interest in this portion of the McCarthy property, as the public's right of continued use was likely formally established as a prescriptive right through historic use. Thus, even if the County's action permitting the relocation of the trail easement was able to be found to be legally permissible, this action does not simultaneously extinguish the underlying prescriptive rights of use that are held by the public at large. While the lack of the Applicants' legal authority to carry out the project is alone a sufficient basis for denial of the project, and Commission staff encouraged the Applicants to withdraw their proposed project for these reasons, the Applicants' continued pursuit of the project thus requires further analysis and Commission action.

The County-approved project is located in an area that includes extensive public access and recreation opportunities and serves as a coastal recreation hub. It includes public trails on Ontario Ridge and down to Pirates Cove Beach. The Ontario Ridge Trail stretches from the Pirates Cove parking area up and across the McCarthy property to the top of the ridge, and ultimately to Pismo Beach along the top of the ridge and to Sycamore Mineral Springs down the opposite side of the ridge. A separate existing trail also extends from the Pirates Cove parking area to Pismo Beach along the blufftop. The existing trail on the McCarthy property is well used and very popular because the trail is located adjacent to, and connects with, all of these related public access features, it provides dramatic and sweeping vistas of the ocean and coastline, and its steepness provides for a unique and long-standing user experience of a straight ascent from Cave Landing Road to the top of the ridge. The County-approved replacement trail would provide a different experience that would be generally more meandering and have a more gradual ascent and descent than the existing trail. It would also be located generally farther to the west and farther away from the access "hub" features identified above with a reduced (but still dramatic) coastal vista to the south.

The Coastal Act and the LCP require that existing public accessways be protected and that public recreational access be maximized. In particular, it applies to low- and no-cost access such as public trails. In short, the Coastal Act and LCP are strongly protective of

existing public trails and public recreational access rights, such as exist in this case currently. This trail has a very loyal following of trail users that specifically seek out this trail due to its unique slope and stunning coastal vista. The County-approved project is inconsistent with Coastal Act and LCP public access and recreation policies because it effectively extinguishes this unique and heavily used public trail, thereby reducing access for those members of the public who enjoy the existing trail for its unique attributes that would not be replicated by the County-approved replacement trail. In addition, the approved project includes a series of related elements, such as property-line fencing, some of which is barbed wire, and “No Trespassing” signs, which will further reduce public access and adversely impact the public access and recreational experience at this location. The protection of existing public recreational access and public rights are some of the cornerstone principles of the Coastal Act and the County LCP, and any proposal to materially change those rights must only be allowed in a situation where the change would at minimum be equal to, but ideally result in *better* public access and *better* coastal resource protection, than the status quo. As explained in more detail below, and as evidenced by the strong concerns voiced by members of the public who actively use this existing trail and vehemently oppose what they consider to be an inferior replacement, this project does not meet that standard and must be denied accordingly.

In addition, the County-approved project is located in the LCP-designated Ontario Ridge Sensitive Resource Area (SRA), a protective LCP designation denoted to recognize the area’s important scenic backdrop. Ontario Ridge forms an important scenic backdrop for the coastal areas of Avila Beach and Pismo Beach, and for the overall Pirates Cove public access and recreational area, and it is part of a significant and rather unique public viewshed. The LCP includes a suite of policies broadly protecting visual and scenic resources, as well as a set of specific standards governing development in SRAs. The County-approved project is inconsistent with these requirements because the project includes property-line barbed wire fencing, gates, and “No Trespassing” signage that would be prominent in the public view in a way that will degrade the character of this significant scenic public viewshed. In addition, the project would create a new developed trail on the side of an undeveloped portion of the hillside, with associated grading, cut, and fill that would degrade the public view and materially change the area’s rural scenic character.

The County-approved project is also located within an LCP-designated Archaeological Sensitive Area (ASA). The LCP requires that archaeological resources, including ASAs, be protected and preserved, with the highest priority given to avoiding disturbance of the resources. The County’s approval raises issues with these requirements because it appears to allow portions of the project to be constructed on and/or adjacent to identified archaeological resources. Comments received by the County regarding the project include those from the Northern Chumash Tribal Council, who do not support the trail’s relocation due to potential archaeological and tribal resource impacts.

The project is also located within a geological hazard area and the project would introduce substantial cut, fill, and grading that may contribute to erosion or geological

instability. Ontario Ridge is also well known to include a rich mosaic of oak woodlands, wetland seeps, and drainages that intermix with chaparral and grassland habitats, much of which is an environmentally sensitive habitat area (ESHA) that is protected through numerous LCP provisions. The lack of biological surveys prior to the County approval and lack of mitigation measures raises issues with respect to the protection of ESHA.

Finally, staff notes that the McCarthy property is the site of a previous Coastal Commission CDP denial (for a proposed residence and related development) that would have covered the existing trail with a private residential driveway (which remains the subject of litigation after the Applicants' appealed the Superior Court's decision upholding the Commission's action); is the site of a previous Commission Cease and Desist Order that required the Applicants to remove unpermitted obstructions that blocked use of the trail in question; and the site of a recent CDP application to the County for substantially the same project that was denied by the Commission (i.e., the CDP decision currently before the Court of Appeals), which project again proposes to use the easement and trail area for a private residential driveway.

In short, staff recommends that the Commission find that the County's action raises substantial Coastal Act and LCP conformance issues and that the Commission take jurisdiction over the CDP application. Due to the above conformance issues, particularly with respect to Coastal Act and LCP public access and recreation protections, and the problematic precedential nature of adversely modifying existing, bona fide public coastal trails and public rights, staff further recommends that the Commission, on de novo review, deny the CDP. The motions and resolutions to do so are found on page 7 below.

TABLE OF CONTENTS

1. MOTIONS AND RESOLUTIONS **7**
 A. Substantial Issue Determination 7
2. FINDINGS AND DECLARATIONS **8**
 A. Project Location 8
 B. Project Description 8
 C. San Luis Obispo County Approval and Appeal History 9
 D. Appeal Procedures 12
 E. Summary of Appeal Contentions 13
 F. Substantial Issue Determination 13
 1. Public Access and Recreation 14
 2. Archeological Resources 17
 3. Visual Resources 18
 4. Geological Hazards 19
 5. Environmentally Sensitive Habitat Area 20
 6. The Five “Substantial Issue” Factors 21
 7. Substantial Issue Determination Conclusion 21
 G. De Novo Coastal Development Permit Determination 22
 1. Legal Authority to Construct the Project 22
 2. Public Access and Recreation 25
 3. Other Coastal Resource Issues 25
 H. California Environmental Quality Act (CEQA) 26
APPENDICES **26**
 A. Substantive File Documents 26
 B. Staff Contact with Agencies and Groups 26

EXHIBITS

- Exhibit 1 – Location Maps
- Exhibit 2 – Site Photos
- Exhibit 3 – County-Approved Project Plans and Conditions of Approval
- Exhibit 4 – County’s Final Local CDP Action Notice
- Exhibit 5 – Appeal Contentions
- Exhibit 6 – McCarthy Public Access Easement
- Exhibit 7 – Coastal Commission Cease and Desist Order No. CCC-14-CD-02

1. MOTIONS AND RESOLUTIONS

A. Substantial Issue Determination

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was 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 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-17-0062 raises no substantial issue with respect to the grounds on which the appeal has 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-17-0062 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified San Luis Obispo County Local Coastal Program.*

B. CDP Determination

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

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-SLO-17-0062 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-17-0062 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

The County-approved project is located on two undeveloped parcels totaling some 63 acres on the north side of Cave Landing Road and flanking Ontario Ridge, between Avila Beach and Pismo Beach in unincorporated San Luis Obispo County (APNs 076-231-060 and 076-231-063).

The project site is located in the Pirates Cove area, which is part of a large, generally undeveloped knoll on the ocean-facing flank of Ontario Ridge located to the east and above the town of Avila Beach. The area is just northeast of the Avila Tank Farm site² and above the Pirates Cove public coastal access area, which is a County-owned blufftop park and beach. The entire area is connected by a series of public trails that traverse the Ontario ridge, including the trail on the Applicants' property that provides a direct connection between the ridgeline trails, Cave Landing Road, and ultimately to the trail that provides access to the popular Pirates Cove Beach. There is an existing public access easement, held by the County, that protects the trail connection located on the Applicant's property for public use. In sum, the area contains a number of heavily used public trails that provide recreational opportunities along the ridge and access down to the beach. See **Exhibit 1** for project location and trail maps and **Exhibit 2** for photos of the project site.

The project parcels are designated Residential Rural in the LCP and are located outside of the Avila Beach Urban Services Line (USL) in an area subject to the LCP's San Luis Bay Coastal Area Plan.³ This Area Plan maps the site as part of the Ontario Ridge Sensitive Resource Area (SRA) for its "important scenic backdrop for the coastal area of Avila Beach and Pismo Beach, as well as for the Avila Valley." Each parcel is also mapped as an Archaeological Sensitive Area (ASA) and Geologic Study Area (GSA) due to the presence of archaeological resources and geologic instability and steep slopes, respectively.

B. Project Description

The County's approval authorized the relocation of a portion of an existing public access pedestrian trail (i.e., a portion of the Ontario Ridge Trail) from APN 076-231-063 (the McCarthy property) to the adjacent APN 076-231-060 (the Palm Finance Corporation property⁴); extinguishment of the easement on the McCarthy property and creation of a new 20-foot-wide public access pedestrian trail and easement on the Palm Finance

² The Avila Tank Farm site was previously owned by Unocal Oil and is now owned by Chevron. Oil was stored in tanks at the site over many decades. The site has been undergoing remediation for a number of years and is currently the focus of ongoing planning efforts related to its potential reuse.

³ The San Luis Obispo County LCP includes four segments: North Coast, Estero, San Luis Bay, and South County.

⁴ The property was owned by San Miguelito Partners during the County's approval process, but is now owned by the Palm Finance Corporation. The Palm Finance Corporation has declined to be a co-applicant for the project.

Corporation property; and construction of a 5-foot-wide decomposed granite public trail within the relocated easement and associated improvements, including fencing, signage, gates, and benches.

More specifically, about 1,400 feet of the existing trail (i.e., the portion of trail on the McCarthy property that steeply ascends to the ridgeline from Cave Landing Road) would be relocated about 400 feet inland and to the north onto the adjacent Palm Finance Corporation-owned parcel. The new trail's alignment would then make a more gradual ascent to the top of the ridge and ultimately connect with the remaining (unchanged) portion of the Ontario Ridge Trail on the flatter top of the McCarthy property. The Ontario Ridge Trail then leaves the McCarthy property and traverses the ridge all the way to Shell Beach Road in the City of Pismo Beach (no changes would be made to this portion of the trail).

The new trail would have a less steep, more meandering alignment up the ridge and thus it would be about 2,500 feet in length (compared with the existing 1,400-foot steep ascending trail on the McCarthy property). About 2,000 feet of the new trail would be graded into the hillside. Grading would total some 1,260 cubic yards, with cuts roughly 5 feet tall, to provide for a 5-foot-wide decomposed granite trail. The trail would be flanked by wire fencing⁵ up to 54 inches tall, some of which could be barbed wire. To ensure trail users do not stray off the trail, seven 6-inch by 12-inch "No Trespassing" signs would be affixed to the new fencing. The new trail would be located within a new 20-foot-wide easement proposed to be held by the County for public recreational access purposes.

See the County's conditions of approval and approved project plans in **Exhibit 3**.

C. San Luis Obispo County Approval and Appeal History

On September 19, 2017 the San Luis Obispo County Board of Supervisors approved a CDP for the proposed project (County CDP Application No. DRC2014-00072). Notice of the County's final action on the CDP was received in the Coastal Commission's Central Coast District Office on October 16, 2017 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on October 17, 2017 and concluded at 5 pm on October 30, 2017. Two valid appeals were received during the appeal period. See **Exhibit 5** for the full text of the appeals.

The project is related to other previous Commission actions regarding the McCarthy property. In 2013, on de novo review, the Commission denied the Applicants' proposed residence (CDP Appeal and Application Number A-3-SLO-11-061). Specifically, the Applicants proposed construction of a 5,500-square-foot single-family residence and a 1,000-square-foot secondary residence to be located above a 1,000-square-foot garage/workshop. Proposed related improvements included an access road/driveway (including paving and retaining walls); site preparation and grading for building pads, additional roads, and a septic system; a 10,000-gallon water tank and landscaping; and

⁵ This fencing is required by the County to be at least 20 feet from the trail's outer edges.

the extension of water lines and utilities from Avila Beach Drive up Cave Landing Road to the project site. The Commission denied the project based on numerous LCP inconsistencies, but particularly with respect to water supply (i.e., the LCP does not allow for a public water service extension to serve this parcel) and public viewshed impacts (the project would materially change this rural, open, and highly visible site with the introduction of a significant house, grading, retaining walls, and driveway). The Commission found:

In sum, although some components of the project that result in LCP inconsistencies could possibly be rectified by conditions of approval (e.g. by eliminating all retaining walls and patio/decks over the ASA) [Archeologically Sensitive Area], and although some aspects of the project could be improved otherwise (e.g., related to public trail use), the water supply and public viewshed inconsistencies cannot be so readily fixed. Thus the Commission denies the coastal development permit application, encouraging the Applicants to come back with a reduced scale residential project with a secure water source that otherwise addresses coastal resource issues, all consistent with the findings of this report.

It should also be noted that the Commission was concerned with the residence's impacts on public recreational access, including having the residence block off/terminate trail use or otherwise detract from its utility. However, at the time, the Commission (and the County before it) was unaware that the steep portion of the trail on the Applicants' property was part of, and encumbered by, a public access easement held by the County. Instead, the Commission's evaluation and understanding was that there was a heavily used trail on private property (i.e., a "jeep trail [that] is heavily used by the public today as if it were a public trail"). The Commission noted that the trail may be part of a public prescriptive rights easement, but such determination had not yet been made. In other words, it was unclear whether the public had a legal right to use the trail, which, in any case, would have been removed by the proposed project and replaced with a driveway to the proposed residence. Thus, as stated in the Commission's findings regarding denial of CDP A-3-SLO-11-061, the Commission, while concerned about impacts to the trail and potential public use, could not officially evaluate public trail impacts as an explicit basis for project denial:

The Coastal Act and the LCP would suggest that such negative public recreational access impact be avoided, and if not avoidable minimized and mitigated. However, these trails are located on private property, and there has not yet been a formal adjudication establishing whether there has been an implied dedication of a public access easement at this site. Thus, the Commission finds that although the trails in question are important components of the trail system in the Pirates Cove area, and likewise important components of the CCT system at this location, without further evidence in the record, the Commission cannot currently require that the Applicants provide an easement over these trails. Differing facts may change this public access context in the future, but the fact that the proposed project does not protect nor provide for

continued public trail use on the Applicants' property is not a basis for denial in this case at this time.

Subsequent to the Commission's denial, in late 2013, the Applicants installed a series of barbed wire fences, gates, and no trespassing signs to eliminate public use of the trail system, without the requisite CDP approval. While investigating the alleged violations, County staff and Commission staff became aware that the trail in question was not an informal jeep trail on private property (as was understood during the CDP denial related to the proposed McCarthy residence), but rather was part of a public access easement held by the County in trust for public benefit. Specifically, the McCarthy property easement was recorded in 2009 (when the property was owned by San Miguelito Partners) and provides for a 20-foot-wide easement for "recreational and other purposes pursuant to Civil Code section 846" (see **Exhibit 6**).

Thus, the trail in question on the McCarthy property, during both the CDP denial and the then-pending fencing/signage violation, was in fact actually a *public trail on a County-held public access easement*. The easement was duly recorded in the chain of title for the property with the San Luis Obispo County Recorder's Office as Document No. 2009069462, on December 18, 2009. The Applicants therefore had notice of the existence of the access easement when they purchased the property in 2010.

With respect to the violations, on July 11, 2014, the Commission issued Cease and Desist Order No. CCC-14-CD-02 to the Applicant's related to the property at issue here and made a formal finding that a violation had occurred (thus requiring the Executive Director to record a Notice of Violation against title to the property, pursuant to Coastal Act section 30812(d)) to address public access-related Coastal Act violations at the site (the Notice of Violation and Cease and Desist Order collectively referred to herein as the "Orders").⁶ The Orders sought to address the variety of unpermitted development that adversely affected the public's use of a public access trail that forms part of the Ontario Ridge Trail. This unpermitted development included installation of unpermitted fencing, gates, signage, and the footings and support structures to fortify this development. This unpermitted development not only physically blocked the public from reaching this public trail, but, through the placement of signs and other structures, also psychologically dissuaded and prevented use of the trail, and impeded public views of the coast therefrom. The Orders required:

Additionally Commission staff recommends that the Commission approve Cease and Desist Order No. CCC-14-CD-02 (the "Order") to address unpermitted development by requiring the removal of all gates, fences, signs, and footings and support structures from the Property and adjacent properties upon which unpermitted development may also have been placed. The proposed Order additionally would preclude the McCarthys from taking any actions to physically

⁶ The period of time in which an aggrieved party was legally able to challenge the Commission's action on the issuance of the Orders and the findings made to support issuance of the Orders was 60 days from the date the Commission voted to approve those Orders. That period of time has long since run, and therefore the Orders are final and cannot be challenged in a court of law.

or indirectly impede the public's use of the Ontario Ridge Trail system, including the easement on their property.

The Applicants have since removed the unpermitted development per the Order and restored public access on the property.

On March 8, 2013, the Applicants sued the Commission over its denial of the proposed residence in A-3-SLO-11-061. The case was bifurcated to litigate five of eight causes of action first, with the Commission prevailing in all five.⁷ Instead of moving on the second phase of the litigation, the Commission agreed to stay the litigation while the parties explored a potential settlement. That stay has since been lifted and the Applicants have appealed the trial court's decision.

To address trail and easement issues (and thus the fact that the Applicants' residential proposal would actually take place on top of and replace an existing public access easement and trail, raising not only public recreational access but also additional and new public view issues (i.e., public views of the proposed development as seen from the public trail), the Applicants proposed to relocate the trail off of their property and extinguish the public access easement on their property. The County approved the CDP for relocation of the trail and extinguishment of the easement in 2017. That project is this subject of this appeal. Finally, in late 2019, the Applicants applied to the County for another CDP to allow roughly the same residential project that was denied by the Commission, for which litigation in the court of appeals is pending, including again proposing to use the area of the existing trail on the existing public access easement for their proposed driveway. That application remains unfiled, including because the Applicants have not demonstrated they have access to a water supply.

D. 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, or (3) in a sensitive coastal resource area; and (4) 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. The County's approval of this project is appealable because the proposed development is located between the sea and the first public road (which in this case is Shell Beach Road), and because the project is located within a designated sensitive coastal

⁷ The remaining three causes of action that were bifurcated from the original litigation have since been dismissed by the Applicants.

resource area under the LCP. The project is also appealable because the zoning district for the project designates more than one principally permitted use and thus all “principally permitted uses” are appealable per Coastal Act section 30603(a)(4).

The grounds for appeal under Section 30603(b)(1) are limited to allegations that the development does not conform to the certified LCP and/or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to consider a CDP for an appealed project de novo unless a majority of the Commissioners present finds that “no substantial issue” is raised by such allegations. Under Section 30604(b), if the Commission conducts the de novo portion of an appeal hearing (following a determination of “substantial issue”) the Commission may approve a CDP if it finds the proposed development consistent with the certified LCP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission were to approve the project following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question are the Applicants (or the Applicants’ representatives), persons opposed to the project who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the de novo CDP determination stage of an appeal during public comment.

E. Summary of Appeal Contentions

The appeals contend that the County-approved project is inconsistent with numerous Coastal Act and corresponding San Luis Obispo LCP provisions, including those that maximize public coastal access and recreational opportunities, that protect existing public access and recreation trails, and that protect other coastal resources (tribal and archaeological resources, biological resources, and visual resources). Generally, the appeals state that the project would adversely impact existing public recreation and existing public rights by extinguishing an existing public access easement that is located on a unique and dramatic public trail, and replacing it with an easement over an inferior trail. See **Exhibit 5** for the Appellants’ appeal documents and contentions.

F. Substantial Issue Determination

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.” Section 13115(c) of the Commission regulations 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 with the

public access policies of the Coastal Act; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of 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.

In this case, for the reasons discussed further below, the Commission determines that the County's approval of a CDP for the project raises a substantial LCP conformance issue.

1. Public Access and Recreation

Applicable Coastal Act and LCP Provisions

The project site is located between the sea and the first public road (i.e., Shell Beach Road), and thus the Coastal Act's public access and recreation policies, as well as the public access and recreation provisions of the LCP, are applicable to the project. The Coastal Act's access and recreation policies provide significant direction regarding not only protecting public recreational access, but also ensuring that access is provided and maximized. Specifically, Coastal Act Section 30210 requires that maximum public access and recreational opportunities be provided. This direction to maximize access and recreational opportunities represents a different threshold than to simply provide or protect such access, and is fundamentally different from other like provisions in this respect. In other words, it is not enough to simply provide access to and along the coast, and not enough to simply protect such access; rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects, and provides fundamental direction with respect to projects along the California coast that raise public access issues, such as this one.

Beyond that fundamental direction and requirement that public recreational access opportunities be maximized for all in the coastal zone, the Coastal Act provides a series of mechanisms designed to meet that objective and to ensure public access considering appropriate time, manner, and place considerations. For example, Section 30211 prohibits development from interfering with the public's right of access when acquired by legislative authorization or by use. In approving new development, Section 30212(a) requires new development to provide access from the nearest public roadway to the shoreline and along the coast, except in certain limited exceptions, such as when there is existing adequate access nearby. Section 30212.5 identifies that public facilities are to be appropriately distributed throughout an area to minimize overcrowding and overuse at any single location. This section has been used in the past to ensure an adequate distribution of access points are provided at appropriate intervals. Importantly, Section 30213 requires that lower-cost visitor and recreational access facilities be protected, encouraged and provided, and gives a stated preference to development that provides public recreational access opportunities. And Coastal Act Section 30220 requires that areas that provide water-oriented recreational activities be protected, while Section 30221 states that oceanfront land suitable for recreational use shall be

protected for recreational use and development, and Section 30223 protects upland areas such as this one necessary to support coastal recreational uses. Finally, Coastal Act Section 30604(c) requires that every CDP issued for any development between the nearest public road and the sea “shall include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3,” and thus because the proposed project is located seaward of the first public road and the sea, this additional finding must be made to approve a project in this case. Applicable Coastal Act policies include:

Coastal Act Section 30210: *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

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

Coastal Act Section 30212(a): *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...*

Coastal Act Section 30212.5: *Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.*

Coastal Act Section 30213: *Lower cost visitor and recreational facilities; encouragement and provision; overnight room rental. Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided...*

Coastal Act Section 30220: *Protection of certain water-oriented activities
Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

Coastal Act Section 30221: *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

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

Coastal Act Section 30604(c): Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

Similarly, the County's LCP reiterates and amplifies Coastal Act direction, including through requiring that coastal public access and recreational opportunities be maximized for everyone, that existing accessways be protected, and that existing recreational facilities be protected, particularly ones that are lower-cost, including:

Access Policy 1. Development shall not interfere with the public's right of access to the sea where acquired through historic use of legislative authorization.

Access Policy 2. Maximum public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development...

Recreation Policy 1. Coastal recreational and visitor-serving facilities, especially lower-cost facilities, shall be protected, encouraged and where feasible provided by both public and private means.

Analysis

The County-approved project is located in an area that includes extensive public access and recreation opportunities and serves as a coastal recreation hub. This includes public trails on Ontario Ridge and down to Pirates Cove Beach. The Ontario Ridge Trail stretches from the Pirates Cove parking area up and across the McCarthy property to the top of the ridge, and ultimately to Pismo Beach along the top of the ridge and to Sycamore Mineral Springs down the opposite side of the ridge. A separate existing trail also extends from the Pirates Cove parking area to Pismo Beach along the blufftop as well. The existing trail on the McCarthy property is well used and very popular for a variety of reasons: the trail is located adjacent to and connects with all of these related public access features; it provides dramatic and sweeping vistas of the ocean and coastline; and its steepness provides a unique and long-standing user experience due to its direct ascent from Cave Landing Road to the top of the ridge. The County-approved replacement trail would provide a different and less unique experience that would be generally more meandering and have a more gradual ascent and descent than the existing trail. It would be located generally farther to the west and farther away from the access "hub" features identified above, with a reduced (but still dramatic) coastal vista to the south.

As described above, the Coastal Act and LCP protect existing public trails and public access rights, such as in the case here. This trail has a large cadre of trail users that specifically seek out this trail due to its unique slope and stunning coastal vista. The County-approved project is inconsistent with the above-cited Coastal Act and LCP public access and recreation policies because it effectively extinguishes this unique and heavily used public trail, thereby reducing access for those members of the public who

enjoy the existing trail for its unique attributes that are not replicated by the County-approved replacement trail. In addition, the approved project includes a series of related elements, such as property-line fencing, some of which is barbed wire, and “No Trespassing” signs, which will further adversely impact the public access experience at this location. For these reasons, the County-approved project raises a substantial issue of conformance with the public access and recreation policies of the Coastal Act and the LCP.

2. Archeological Resources

Applicable LCP Provisions

The County-approved project is also located within an LCP-designated Archaeological Sensitive Area (ASA). The LCP requires that archaeological resources, including ASAs, be protected and preserved, with the highest priority given to avoiding disturbance of the resources.

Archeological Policy 1: Protection of Archaeological Resources The county shall provide for the protection of both known and potential archaeological resources. All available measures, including purchase, tax relief, purchase of development rights, etc., shall be explored at the time of a development proposal to avoid development on important archaeological sites. Where these measures are not feasible and development will adversely affect identified archaeological or paleontological resources, adequate mitigation shall be required.

Archeological Policy 4: Preliminary Site Survey for Development within Archaeologically Sensitive Areas Development shall require a preliminary site survey by a qualified archaeologist knowledgeable in Chumash culture prior to a determination of the potential environmental impacts of the project.

Archeological Policy 5: Mitigation Techniques for Preliminary Site Survey before Construction Where substantial archaeological resources are found as a result of a preliminary site survey before construction, the county shall require a mitigation plan to protect the site. Some examples of specific mitigation techniques include:

a. Project redesign could reduce adverse impacts of the project through relocation of open space, landscaping or parking facilities.

b. Preservation of an archaeological site can sometimes be accomplished by covering the site with a layer of fill sufficiently thick to insulate it from impact. This surface can then be used for building that does not require extensive foundations or removal of all topsoil.

c. When a project impact cannot be avoided, it may be necessary to conduct a salvage operation. This is usually a last resort alternative because excavation, even under the best conditions, is limited by time, costs and technology. Where the chosen mitigation measure necessitates removal of archaeological

resources, the county shall require the evaluation and proper deposition of the findings based on consultation with a qualified archaeologist knowledgeable in the Chumash culture.

d. A qualified archaeologist knowledgeable in the Chumash culture may need to be on-site during initial grading and utility trenching for projects within sensitive areas.

Analysis

The County's approval raises issues with the above-cited LCP provisions because it appears to allow portions of the project to be constructed on and/or adjacent to mapped archaeological resources. Comments received on the project by the County include those from the Northern Chumash Tribal Council indicating that the Tribe does not support the County-approved project. Thus, the full scope of archaeological and Native American issues has not been appropriately addressed as required by the LCP, and the County-approved project raises a substantial issue of conformance with the archaeological protection provisions of the LCP.

3. Visual Resources

Applicable LCP Provisions

The County-approved project is located in the LCP-designated Ontario Ridge Sensitive Resource Area (SRA), a protective LCP designation denoted to recognize the area's important scenic backdrop. The LCP includes a suite of policies broadly protecting visual and scenic resources, as well as a set of specific standards governing development in SRAs:

Visual and Scenic Resources Policy 1: Protection of Visual and Scenic Resources Unique and attractive features of the landscape, including but not limited to unusual landforms, scenic vistas and sensitive habitats are to be preserved protected, and in visually degraded areas restored where feasible.

Visual and Scenic Resources Policy 2: Site Selection for New Development Permitted development shall be sited so as to protect views to and along the ocean and scenic coastal areas. Wherever possible, site selection for new development is to emphasize locations not visible from major public view corridors. In particular, new development should utilize slope created "pockets" to shield development and minimize visual intrusion.

Visual and Scenic Resources Policy 4: New Development in Rural Areas New development shall be sited to minimize its visibility from public view corridors. Structures shall be designed (height, bulk, style) to be subordinate to, and blend with, the rural character of the area. New development which cannot be sited outside of public view corridors is to be screened utilizing native vegetation; however, such vegetation, when mature, must also be selected and sited in such a manner as to not obstruct major public views. New land divisions whose only building site would be on a highly visible slope or ridgetop shall be prohibited.

Visual and Scenic Resources Policy 5: Landform Alterations Grading, earthmoving, major vegetation removal and other landform alterations within public view corridors are to be minimized. Where feasible, contours of the finished surface are to blend with adjacent natural terrain to achieve a consistent grade and natural appearance.

Analysis

Ontario Ridge forms an important scenic backdrop for the coastal areas of Avila Beach and Pismo Beach, and for the overall Pirates Cove public access and recreational area. It is part of a significant and rather stunning public viewshed. Per the above-cited LCP provisions, new development must be sited to protect scenic views, minimize visibility from public view corridors, be located in the least visible portion of the site, minimize structural height and mass by using low-profile design, and be subordinate to and blend with the rural character of the area. The County-approved project is inconsistent with these requirements because the project includes property-line barbed wire fencing, gates, and “No Trespassing” signage that would be prominent in the public view in a way that will degrade the character of this significant scenic public viewshed. In addition, the project would create a new developed trail on the side of an undeveloped portion of the hillside, with associated grading, cut, and fill that would degrade the public view and materially change the area’s rural scenic character. For these reasons, the County-approved project raises a substantial issue of conformance with the visual resource protection provisions of the LCP.

4. Geological Hazards

Applicable LCP Provisions

The LCP requires that new development ensure structural stability while not creating or contributing to erosion or geological instability. Applicable provisions include:

Hazards Policy 1: New Development All new development proposed within areas subject to natural hazards from geologic or flood conditions (including beach erosion) shall be located and designed to minimize risks to human life and property. Along the shoreline new development (with the exception of coastal-dependent uses or public recreation facilities) shall be designed so that shoreline protective devices (such as seawalls, cliff retaining walls, revetments, breakwaters, groins) that would substantially alter landforms or natural shoreline processes, will not be needed for the life of the structure. Construction of permanent structures on the beach shall be prohibited except for facilities necessary for public health and safety such as lifeguard towers.

Hazards Policy 2: Erosion and Geologic Stability New development shall ensure structural stability while not creating or contributing to erosion or geological instability.

Analysis

The County-approved project is also located within an LCP-designated Geologic Study Area. The approved trail construction is located on a steep slope and in an area known for overall geologic instability (including due to faults, landslides, unconsolidated soils and slopes, erosion, etc.). The approved project includes substantial areas of cut and fill for the new trail, and potential retaining walls and engineered drainage and erosion control devices on multiple sections of the site. It is not clear from the County's file and findings whether the project can ensure safety from, and not contribute to, geologic hazards, as is required by the LCP. As such, the County-approved project raises a substantial issue of conformance with the geological hazards provisions of the LCP.

5. Environmentally Sensitive Habitat Area

Applicable LCP Provisions

The County-approved project is located on the slopes along Ontario Ridge, which contains a number of habitats, some of which constitute Environmentally Sensitive Habitat Area (ESHA). The LCP contains a number of provisions to protect ESHA, including:

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.*

ESHA Policy 3: Habitat Restoration *The county or Coastal Commission should require the restoration of damaged habitats as a condition of approval when feasible. Detailed wetlands restoration criteria are discussed in Policy 11.*

Analysis

Ontario Ridge is well known to include a rich mosaic of oak woodlands, wetland seeps, and drainages that intermix with chaparral and grassland habitats. Much of this area is environmentally sensitive habitat area (ESHA) per the LCP and requires protection per the LCP. It is not clear from the County's file and findings whether the relocated trail and disturbance area extends onto or in close proximity to such habitat areas, and to what degree such resources may require additional protection. As such, the County-approved project raises a substantial issue of conformance with the ESHA protection provisions of the LCP.

6. 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 a de novo CDP 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: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to 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.

In this case, these five factors, considered together, strongly support a conclusion that the County’s approval of this project raises a substantial issue of LCP conformance. Regarding the first factor, the County did not provide adequate justification for why it was appropriate to eliminate existing public access rights, and why or how the replacement access was equal to or better in terms of providing public access as compared with the existing trail alignment. On the contrary, the available facts and evidence suggest that the Coastal Act and LCP requirements have not been met, thus requiring that the Commission find that the project raises a substantial issue of conformance with the Coastal Act and the LCP. Thus, the County has not provided adequate factual or legal support for its decision to modify the existing trail.

Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of substantial issue because it implicates existing public rights and public trails heavily used by the public. Regarding the third factor, the proposed project affects core coastal resources in terms of public access and recreation, as well as visual resources in a very visually sensitive area. Thus, the third factor also supports a finding of substantial issue. Regarding the fourth factor, because the project raises such coastal resource protection concerns, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP, including the appropriateness of modifying existing public access trails and public rights. Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to statewide concerns regarding the modification and removal of existing public access trails and easements. In short, the County-approved project does not adequately address Coastal Act and LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue.

7. Substantial Issue Determination Conclusion

For the reasons stated above, the Commission finds that the County’s approval of the project raises a substantial LCP conformance issue with respect to the grounds on

which the appeal has been filed under Section 30603 of the Coastal Act, and therefore the Commission takes de novo jurisdiction over the CDP application for the proposed project.

G. De Novo Coastal Development Permit Determination

The standard of review for this CDP determination is the San Luis Obispo County certified LCP and, because the project is located between the sea and the first public road paralleling the sea, the public access and recreation policies of the Coastal Act. All Substantial Issue Determination findings above are incorporated herein by reference.

1. Legal Authority to Construct the Project

The Coastal Act requires CDP applicants to either demonstrate a fee interest in the subject property, demonstrate that they have the legal right to use the property for the proposed development, or the owner of the property must join as a co-applicant for the project. In addition, the Coastal Act requires that applicants demonstrate that they have the authority to comply with all conditions. The relevant section states:

Coastal Act Section 30601.5. *Where the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the commission shall not require the holder or owner of any superior interest in the property to join the applicant as coapplicant. All holders or owners of any other interests of record in the affected property shall be notified in writing of the permit application and invited to join as coapplicant. In addition, prior to the issuance of a coastal development permit, the applicant shall demonstrate the authority to comply with all conditions of approval.*

As a threshold issue, the Commission must determine whether the Applicants have the legal authority to construct the project. As explained above, the proposed project includes relocating the existing trail from the McCarthy property, which is owned by the Applicants, to the Palm Finance Corporation property, which is not owned by the Applicants. At the time of the County's approval, the Palm Finance Corporation property was owned by a different entity, the San Miguelito Partners, which was a co-applicant for the then proposed County CDP for the trail relocation project. The San Miguelito Partners property went through a foreclosure process and the property is now owned by the Palm Finance Corporation.

Commission staff has reached out to representatives of Palm Finance Corporation, who have stated that the San Miguelito Partners' prior consent to the trail relocation project is no longer valid. Although Palm Finance Corporation has not taken a position on the merits of the project, it has not provided consent to the current Applicants (Judy and Rob McCarthy) to construct the trail on the Palm Finance Corporation property at this time. The Palm Finance Corporation has also not agreed to be a co-applicant for the project.

The current Applicants have provided no evidence to demonstrate that they either own a fee interest in the Palm Finance Corporation property or that they possess a legal right, interest, or other entitlement to use the Palm Finance Corporation property for the project. The Applicants have not shown that they have express authorization from that property owner to construct the project. Thus, it does not appear that the Applicants have the legal authority to move forward with the project at this time.

Moreover, as explained above, the Commission issued a Cease and Desist Order to the Applicants in 2014. The Orders, which remain in effect, require that the unpermitted development be removed to restore full access to the trail on the McCarthy property. Additionally, Section 1.3 of the Orders require that the McCarthys, “[r]efrain from undertaking any activity that physically or indirectly discourages or prevents use of the Ontario Ridge Trail, including by attempting to cause any person who is present on or adjacent to the Ontario Ridge Trail to leave or to move off of the trail....” Pursuant to Section 2.4 of the Orders, for purposes of those Orders, the “Ontario Ridge Trail” referenced in the above quotation is specifically defined as “[t]hat portion of the public trail, and spurs therefrom, crossing the [McCarthys’ property] that connects public access from Cave Landing Road at Pirates Cove to the trails atop Ontario Ridge.” The Orders therefore require that the McCarthys not interfere with the public’s use of the Ontario Ridge trail *on their property*; relocating the trail off of their property would entirely preclude the use of the trail as it is defined in those Orders, and would therefore be inconsistent with the language of the Orders. Likewise, the Commission’s adopted findings in support of the issuance of the Orders specify that the Orders are to operate to “... preclude the McCarthys from taking any actions to physically or indirectly impede the public’s use of the Ontario Ridge Trail system, including the easement on their property” (Adopted Findings, page 3) (see **Exhibit 7**).

Not only do the Orders define the Trail being protected in said Orders as that portion of trail that is located on the McCarthy property, but the Commission’s adopted findings and the staff presentation for the Commission hearing on the Orders likewise discuss the uniqueness of coastal views that the public are afforded from the trail on the McCarthy property. For instance, page 9 of the adopted findings states, “[v]iews of Pirates Cove and Avila Beach are visible throughout the rise (Exhibit 10), and the top of the knoll provides a spectacular panoramic view of both Avila Beach and Shell Beach (Exhibit 11).” Additionally, in the Commission staff presentation, which forms part of the Commission’s administrative record for the Orders, staff indicated that “[t]he views on and around the McCarthys’ property are widely recognized as significant. In fact, the County Land Use Element demarcates the property as a sensitive resource area because of the viewshed.”

While it’s true that the easement allows it to be relocated, any such allowed relocation is in reference to the plain language of the easement which states that “[t]he Access Easements may be relocated at Grantor’s reasonable discretion and at Grantor’s sole cost and expense **to a location on Grantor’s Property** that Grantor and Grantee shall reasonably agree” (emphasis added). Therefore, when staff stated during the

presentation that the “[p]lain language of the easement provides that they can move the trail,” and when Chair Kinsey averred that “there should be an opportunity for the McCarthys in the future if they choose to work with the County on alternative trail locations,” these statements were made in the context of the then-extant legal parameters of the easement, namely, that such relocation would occur on the McCarthy property.

Similarly, the adopted findings for the Orders provides that, “...the McCarthys...are free to continue to pursue relocation of the easement to a ‘safer’ area with the County, even after the subject Orders issue, as long as the proposed new location is consistent with the legal rights of all parties, and all applicable laws” (Adopted Findings, page 9). While on the face, the language of the easement appears to preclude relocation off of the property, a further likely barrier to off-property relocation arose in the context of the Orders. Namely, the Commission found, based on a prescriptive rights survey and extensive research, that as the public had been using the trail for more than 50 years, a prescriptive use likely exists across the trail, and that the County easement, “...did not create public use, but rather it codified and endorsed the public’s ongoing use of the trail” (Adopted Findings, page 4).

The Commission’s adopted findings for the Orders go so far as to state, “[e]ven if this affirmative easement did not exist, the public would still likely be able to use this portion of the Ontario ridge trail to cross the McCarthy’s property since as described in the staff report evidence tends to demonstrate that a prescriptive right was likely perfected long before the McCarthy’s purchased the property” (Commission staff presentation). This was substantiated by “[t]he Commission’s prescriptive rights investigation [which] produced 281 questionnaires which reveal that the earliest recorded public usage of this trail (by those who submitted questionnaires in 2014) is in 1960. Thus, the public has actually been using this trail for nearly five and a half decades. Such use can develop into an implied dedication and prescriptive rights pursuant to the legal principles enunciated in case law such as Gion-Dietz” (Adopted findings, page 21).

Therefore, Commission findings indicate that the County easement is most likely not the sole basis for a possessory interest in this portion of the McCarthy’s property, as the public’s right of continued use was likely formally established as a prescriptive right through historic use. Thus, even if the County’s action permitting the relocation of the trail easement was able to be found to be legally permissible, this action does not simultaneously extinguish the underlying prescriptive rights of use that are held by the public at large.

Pursuant to the Commission’s Adopted Findings for the Orders, the proposed off-site relocation of the Ontario Ridge Trail would be inconsistent with the Coastal Act, the terms of said Orders, and may be an impermissible alienation of an interest in land held by the public.

Thus the Applicant’s do not appear to have the legal authority to construct the project on the Palm Finance property or remove the trail from their property at all. The Applicant’s

failure to meet the threshold requirements of Section 30601.5 is fatal to this project and the Commission must deny the application on this basis alone. However, even if the Applicants were to have the legal authority to construct the project, the project itself raises a myriad of coastal resource concerns. Because the Applicants have continued to pursue the project despite this clear legal hurdle, additional findings on the merits of the proposed project appear warranted in order to provide further direction regarding potential future projects.

2. Public Access and Recreation

As stated in the Substantial Issue section above, the Coastal Act and the LCP require that existing public accessways be protected and that public access be maximized, particularly low- and no-cost access such as public trails. In short, the Coastal Act and LCP are fiercely protective of existing public trails and public access rights, such as in the case here.

The project proposes to materially change an existing public access easement held by the County. The easement covers an existing, heavily used public access trail that affords a unique opportunity to recreate in this area by providing sweeping coastal and ocean views along an exhilarating steep slope. The trail has a strong constituency that does not support its relocation precisely because of its unique public access utility. In addition, the proposed grading, retaining walls, fencing (some of which is barbed wire), and “No Trespassing” signs would all degrade the public experience by converting a rustic trail with unobstructed public views to one that is engineered and less welcoming.

The protection of existing public access and public rights are some of the cornerstone principles of the Coastal Act, and any proposal that materially affects those rights must only be allowed in a situation where the change would at a minimum be equal to, but ideally result in *better* public access and *better* coastal resource protection, than the status quo. As explained previously, including as evidenced by the strong concerns voiced by members of the public who actively use this existing trail and vehemently oppose what they consider to be an inferior replacement, this project does not meet that test, and must be denied accordingly. As such, denial in this case is required by the Coastal Act’s and LCP’s strong protections for public recreational access rights.

3. Other Coastal Resource Issues

As explained in the Substantial Issue findings, the project raises conformity issues with respect to tribal and archaeological issues, biological issues, visual resource issues, and with respect to geological hazards, including because the trail would be relocated on an undeveloped, highly visible parcel in an area of known tribal resources and sensitive habitats. Further, the project would introduce substantial cut, fill, and grading that may contribute to erosion or geological instability, along with formal paving and perimeter fencing that would create an engineered feel to this currently rural, rustic trail system. While some of these issues could potentially be addressed through siting and design alternatives, more information, including a detailed biological survey, an archaeological reconnaissance, and a geological investigation, would be needed.

However, the project is being denied because the Applicants do not have the legal authority to carry out the project on a property they do not own and because of the project's substantial inconsistencies with the Coastal Act and LCP's public access and recreation policies. Therefore, such additional information and alternatives analysis is not necessary at this time.

H. California Environmental Quality Act (CEQA)

CEQA Section 21080.5(d)(2)(a) prohibits a proposed development from being approved if there are feasible alternatives and/or feasible mitigation measures available that would substantially lessen any significant adverse effect that the development may have on the environment. The Commission's review, analysis, and decision-making process for CDPs and CDP amendments has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of the environmental review required by CEQA (CCR Section 15251(f)).

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.

Accordingly, 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.

APPENDICIES

A. Substantive File Documents⁸

- File for Coastal Development Permit and Appeal Number A-3-SLO-11-061
- File for Cease and Desist Order CCC-14-CD-02

B. Staff Contact with Agencies and Groups

- San Luis Obispo County Planning and Building Department
- Northern Chumash Tribal Council

⁸ These documents are available for review from the Commission's Central Coast District office.