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# Th12b

Appeal Filed: 3/10/2021  
 Action Deadline: 5/18/2021  
 Staff: Mike Watson - SC  
 Staff Report: 3/26/2021  
 Hearing Date: 4/15/2021

## STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

**Appeal Number:** A-3-SLO-21-0020

**Applicant:** Pat Kimbell

**Appellants:** Commissioners Escalante and Hart

**Local Government:** San Luis Obispo County

**Local Decision:** County coastal development permit number PMTR2020-01394 approved by the San Luis Obispo County Planning Department on February 23, 2021.

**Project Location:** 928 El Moro Avenue within the unincorporated community of Los Osos in San Luis Obispo County (APN 038-211-027).

**Project Description:** Construction of a two-story 309-square-foot structure consisting of a 159-square-foot second dwelling unit and 150 square feet of storage space, plus a 72-square-foot deck, on a 6,250-square-foot lot with an existing approximately 1,170-square-foot, two-story home.

**Staff Recommendation:** Substantial Issue Exists

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### 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 will then review that application at a future Commission meeting, 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 CDP that authorized the construction of a new second residential unit on an existing residential lot occupied by an existing home in the Los Osos area of the County inland of Morro Bay, including authorizing sewer connections to the Los Osos community wastewater treatment plant system. The appeal contends that the County-approved project is inconsistent with numerous San Luis Obispo County Local Coastal Program (LCP) water supply and wastewater provisions, including those that require denial of projects where adequate water and wastewater supply are not available. The appeal also states the project is inconsistent with the LCP's environmentally sensitive habitat area (ESHA) provisions, which only allow uses dependent on the habitat within such habitat areas, and only when such allowable uses are sited and designed in a manner that do not significantly disrupt habitat values, and where unavoidable impacts are properly mitigated. The appeal also contends that the project is inconsistent with the LCP's existing second residential unit provisions because the LCP only allows such units on lots that are larger than this property. Moreover, the appeal states that the County impermissibly used an uncertified local ordinance as the legal standard of review for the CDP application rather than the standards of the certified LCP.

With respect to public services, LCP Public Works Policy 1 requires all development in the County to be served by adequate and sustainable water and wastewater services and requires denial of a proposed project should such services not be available. Los Osos is a community that has traditionally suffered from both an inadequate water source (including in terms of water supply from an over-drafted groundwater basin and impacted water quality due to nitrate contamination) and an inadequate wastewater collection and treatment system (including leaking individual septic systems). The Commission recognized all of these constraints when it approved the CDP for the Los Osos Wastewater Project (LOWWP) in 2010, which authorized development of a new modern community wastewater treatment facility and supporting infrastructure. However, due to potential growth inducement impacts (including impacts to water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified), and the need to better proactively and comprehensively plan for potential growth, including to address and mitigate habitat impacts (including via a United States Fish and Wildlife Service-

approved Habitat Conservation Plan (HCP)), the Commission imposed Special Condition 6 on the LOWWP CDP.

Special Condition 6 prohibits wastewater service to serve new growth, such as the project that is the subject of this appeal. It only allows connections for existing development unless and until the LCP is amended to identify appropriate and sustainable buildout limits. Although the County has recently submitted the Los Osos Community Plan to address this issue, at this time the LCP has not yet been amended to establish sustainable buildout limits for new growth in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to new growth is still in effect. Due to this prohibition, there is no wastewater service available to serve the approved project, and the LCP requires denial of the proposed development.

Moreover, the County has not yet developed the groundwater basin management plan that is also required by the LOWWP CDP to be incorporated into the LCP to address such growth in Los Osos. Namely, the County needs to identify sustainable water sources to serve new growth, and have that certified by the Commission, before the sewer connection prohibition of Special Condition 6 can be lifted. The County is working on this, but the LCP has not yet been updated, there is currently no evidence to support a determination that adequate water supply exists to serve the proposed development here, and such growth has not yet been identified as allowed through the required LCP update.

Additionally, all of Los Osos is located atop an ancient dune system and the entire community has traditionally been recognized as ESHA by the Commission, in part due to much of it being USFWS-designated critical habitat for the federally endangered Morro shoulderband snail, and most of the area being mapped in the LCP as ESHA. The County is currently in the midst of finalizing a community-wide sensitive species protection and mitigation program, in the form of an HCP, to identify the areas within the community that are appropriate for development in light of sensitive species concerns, and to provide suitable mitigation to offset the impacts of that development. However, while the County is still actively working on it, the HCP has not yet been certified as part of the required LCP amendment.

In other words, the Commission-required LCP update must be multifaceted. The LCP must be updated to help resolve water, sewer, and ESHA issues, and it must identify what type of growth is allowed given the various constraints around development in Los Osos. Although this process has begun on multiple fronts, is not complete. Accordingly, this project approval is premature. In addition, the County approval did not evaluate ESHA impacts at all and, absent site-specific details, there is insufficient information in the record to conclude that this proposed project can be found consistent with the LCP's ESHA provisions and that it will not have adverse impacts to ESHA.

Finally, the LCP limits second residential units in Los Osos due to their potential to create adverse cumulative effects on essential community services and natural features, including as described above. As such, the LCP requires that lots be at least 12,000 square feet in size to accommodate a second residential unit. Here, the project

site is 6,250 square feet, and the LCP does not allow a second residential unit on this site. Although the County’s approval acknowledges this LCP inconsistency, the County nonetheless approved the CDP as LCP consistent.

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. If the Commission does so, then the de novo hearing on the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution to effect this recommendation are found on page 5.

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## EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – County’s Final Local CDP Action Notice and Project Plans

Exhibit 3 – Appeal of County’s CDP Decision

Exhibit 4 – Commission Staff’s Letters Regarding Special Condition 6

Exhibit 5 – Commission Executive Director’s ADU Memo to Local Governments

## CORRESPONDENCE

Applicant’s Correspondence

## 1. MOTION AND RESOLUTION

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 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-21-0020 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-21-0020 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 Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

## 2. FINDINGS AND DECLARATIONS

### **A. Project Location and Description**

The County-approved project is located at 928 El Moro Avenue in the community of Los Osos, just a few blocks south of the Elfin Forest Natural Preserve and Morro Bay. Los Osos is an unincorporated coastal community of about 15,000 residents that is located in central San Luis Obispo County at the southern end of Morro Bay and roughly due west of the City of San Luis Obispo. The Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known as one of the most important biologic and wetland resources in California's coastal zone. Los Osos is mostly located atop an ancient dune system formed by centuries of wind-blown sand coming from the southern end of Morro Bay. As a result, the terrain consists primarily of gently rolling hills and sandy soils. The sandy soils of Los Osos, its connection to Morro Bay, and its generally mild marine climate have combined to produce a unique coastal ecosystem that is home to a wide variety of uniquely adapted plant and animal species, some of which are found nowhere else in the world.

The project site is currently developed with an approximately 1,170 square-foot, two-story home. The County-approved project includes the construction of a two-story structure consisting of a new 159-square-foot second residential unit and 150 square feet of storage space, plus a 72-square-foot deck. No conditions of approval were placed on the approved project.

See **Exhibit 1** for a location map and **Exhibit 2** for the County-approved project plans.

### **B. San Luis Obispo County Approval**

On February 23, 2021 the San Luis Obispo County Planning Department ministerially approved a CDP for the project. The County's Final Local Action Notice was received in the Coastal Commission's Central Coast District Office on March 1, 2021 (see **Exhibit 2**). The Coastal Commission's ten-working-day appeal period for this action began on March 2, 2021 and concluded at 5pm on March 15, 2021. One valid appeal was received during the appeal period (see **Exhibit 3**).

### **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 within an area that constitutes a sensitive coastal resource area under the LCP and because the project is not designated as the principally permitted use under the LCP.

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 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. 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 at the hearing on the substantial issue recommendation unless at least three Commissioners request it and, if no such hearing is requested, a substantial issue is automatically found. In both cases, 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, the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing.

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 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**

Los Osos has traditionally suffered from inadequate water from an over-drafted groundwater basin and inadequate wastewater collection and treatment, which have led to adverse impacts to groundwater resources and environmentally sensitive habitat areas (ESHAs), including the Morro Bay Estuary. The appeal contends that the County-approved project is inconsistent with numerous San Luis Obispo County Local Coastal Program (LCP) water supply and wastewater provisions, including those that require denial of projects where adequate water supply and wastewater services are not available. The appeal also maintains that the County-approved project is inconsistent with the LCP's ESHA provisions, which only allow uses dependent on the habitat within such habitat areas, and only when such allowable uses are sited and designed in a manner that does not significantly disrupt habitat values. The appeal also states that the entire Los Osos community (including the project site) has been recognized as ESHA by the Commission, including due to much of this area being USFWS-designated critical habitat for the federally endangered Morro shoulderband snail, and thus contends that the County's approval did not adequately analyze impacts to ESHA at the project site. Thus, the appeal states that the County's approval raises significant questions regarding LCP compliance with respect to water, wastewater, and ESHA, including as it appears that there is not adequate wastewater service or adequate water available for the approved project, and impacts to ESHA at the site were not adequately evaluated or

mitigated. The appeal further contends that the project is inconsistent with the LCP's secondary dwelling unit standards because the project site does not meet the minimum lot size requirement and that the County impermissibly used an uncertified ordinance as the standard of review rather than the certified LCP standards. See **Exhibit 3** for the Appellants' contentions.

## **E. Substantial Issue Determination**

### **1. Substantial Issue Background**

The term substantial issue is not defined in the Coastal Act. Rather, the Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603 (Section 30625(b)(2)). And 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) also 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 make a substantial issue determination for other reasons as well.

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

### **2. Public Services**

#### *Applicable LCP Provisions and Los Osos Public Services Background*

The San Luis Obispo County LCP is divided geographically into four areas,<sup>1</sup> each with its own LCP area plan. The LCP also includes a Land Use Plan titled the "Coastal Zone Framework," and an Implementation Plan titled the "Coastal Zone Land Use Ordinance" (CZLUO), which are both applicable throughout all four LCP areas. The subject property is located within the area governed by the Estero Area Plan (EAP).

The Coastal Zone Framework lays out the main objectives of the LCP. With respect to Public Services, Public Works Policy 1 states that the amount, location, and rate of development must be kept within the sustainable capacity of resources, public services, and public facilities. Public Works Policy 6 requires that permitted expansions of public services ensure the protection of natural resources including the biological productivity of coastal waters. And where there are limitations on public services, uses having

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<sup>1</sup> The County's four areas are: North Coast, Estero, San Luis Bay, and South County.

priority under the Coastal Act must not be precluded by the provision of those limited services to non-priority uses. CZLUO Section 23.04.430 carries out these policies, requiring the County to find that adequate public services exist prior to approving any new development in San Luis Obispo County. 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 needed consistent with the Resource Management System where applicable.*

***Public Works Policy 6: Resource Management System.*** *The county will implement the Resource Management System to consider where the necessary resources exist or can be readily developed to support new land uses. Permitted public service expansions shall ensure the protection of coastal natural resources including the biological productivity of coastal waters. In the interim, where they are identified public service limitations, uses having priority under the Coastal Act shall not be precluded by the provision of those limited services to non-priority uses.*

***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.*

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

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

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

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

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

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

Commission subsequently approved the project with a series of special conditions in 2010 (CDP A-3-SLO-09-055/069).<sup>2</sup>

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

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

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

Thus, unless and until the EAP is amended to identify sustainable buildout limits, including in terms of water usage/supply and ESHA considerations, the LOWWP is *prohibited* from serving undeveloped properties within Los Osos. As discussed below,

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<sup>2</sup> Due to the manner in which the County acted on the CDP for the LOWWP (an overall approval action followed by an amendment action to modify a portion of the project), there are two Coastal Commission permit numbers associated with the project.

this prohibition applies to the project here as well. In addition, the Commission found that availability of wastewater service capacity alone “must not induce new growth inconsistent with other resource protection policies of the LCP” and that “Public Works policies 1 and 6 require that adequate public services be available for new development.” In other words, even if a wastewater connection were available, the LCP still requires newly proposed development to provide conclusive evidence that adequate public services, including water, are available to serve the development without causing adverse impacts to the coastal resources identified above.

At this time, although the County has recently submitted the Los Osos Community Plan,<sup>3</sup> the submittal remains unfiled and the LCP has yet to be amended to establish sustainable buildout in Los Osos. Although not yet certified by the Commission, it is notable that the current submittal of the Community Plan prohibits new residential units and establishes a zero percent annual growth rate until certain water efficiency programs required by the Los Osos Groundwater Basin Plan are completed.

Because the Los Osos Community Plan has not yet been certified by the Commission, Special Condition 6’s prohibition on providing wastewater services to new development on undeveloped lots is still in effect.<sup>4</sup> The County has previously recognized that wastewater service to undeveloped parcels is currently prohibited, including through informational brochures that are distributed to Los Osos homeowners and prior denials of new sewer connections to undeveloped properties.<sup>5</sup> Additionally, Commission staff has repeatedly informed the County and property owners of the prohibition (see **Exhibit 4**), including to explain that Special Condition 6 was intended to limit *any* expansion of wastewater service to facilitate increased growth and development in the community and thus must be interpreted broadly. The Commission, too, has found that the CDP’s prohibition on new wastewater service does not only apply to new development on completely vacant parcels, but also to projects that include significant intensifications of use and significant expansions on already-developed properties,<sup>6</sup> or where the property

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<sup>3</sup> The County approved an Environmental Impact Report, HCP, and an EAP amendment for the Los Osos Community Plan on December 15, 2020. The County submitted the LCP amendment request for Coastal Commission consideration on March 2, 2021 (LCP-3-SLO-21-0028-1-Part G). A filing status letter was sent to the County regarding the LCP submittal on March 10, 2021. The amendment remains unfiled as of the date of this report.

<sup>4</sup> The Coastal Commission has previously approved amendments to CDP A-3-SLO-09-055/069 to allow for expansions of the service area of the LOWWP in order to serve already developed properties so as to better protect coastal resources, such as in June 2016 to allow the Monarch Grove area to be added to the service area to avoid continued use of the area’s failing wastewater treatment package plant. The Commission found that those amendments were consistent with the intent of the CDP and Special Condition 6 because they provided for an immediate solution to the community’s wastewater service issues with regard to existing development while not facilitating increased, growth-inducing development until the EAP is updated.

<sup>5</sup> See, for example, County CDP Application DRC2015-00092 (Novy SFD), denied by the County on September 2, 2016.

<sup>6</sup> See, for example, A-3-SLO-19-0180 (Shear Development LLC SFDs), denied by the Commission on July 7, 2020.

owners previously purchased wastewater or water saving credits.<sup>7</sup> And the Commission's LOWWP approval is clear that new additional residential units that utilize water and wastewater service above the baseline at the time of the Commission's 2010 approval, including a completely separate new residential unit as is the case here, are not appropriate and thus prohibited from connecting to the LOWWP until the Estero Area Plan (and sustainable growth limits in relation to water, wastewater, and ESHA, and an accompanying HCP to address ESHA) is amended and certified by the Commission.

### *Appeal Contentions*

The appeals contend that the County-approved project is inconsistent with the aforementioned groundwater resources and water supply policies. Specifically, the contentions state that public services within Los Osos are inadequate to serve new development because the Commission has previously recognized that fact through the imposition of Special Condition 6 on CDP A-3-SLO-09-055/069 and the continuing application of Special Condition 6 in light of present factual circumstances, and absent the required Los Osos Community Plan update to the LCP, wastewater service is not allowed. See the complete appeal documents in **Exhibit 3**.

### *Analysis*

The County-approved project includes the construction of a new two-story, 309 square-foot residential unit consisting of 150 square feet of living space and 150 square feet of storage space, plus a 72-square-foot deck, on a parcel that already contains an existing approximately 1,170 square-foot, two-story home within the Los Osos community. The County recently approved (on December 16, 2020) eight other second residential units on properties with existing homes within the Los Osos community, all of which were also appealed to the Commission.<sup>8</sup> Similar to those cases, in this case the County also

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<sup>7</sup> Los Osos residents have previously inquired whether properties that have secured wastewater or water saving credits (otherwise known as "Title I9 Retrofit Certificates") could be developed prior to the EAP update. In terms of wastewater credits, the RWQCB has indicated that any credits available from past actions were intended for properties that were already eligible to connect to the sewer. For example, if someone has a property that is eligible to connect to the community sewer system and wants to build prior to being hooked up to the sewer, then that person could utilize a credit to install a temporary septic system. However, as detailed above, only already-developed properties are eligible for sewer connections at this time and thus those properties would not need a temporary septic credit. In terms of water saving certificates, these certificates alone do not entitle one to development at this time. Although these water conservation certificates were previously issued to properties in the septic prohibition zone, the certificate does not guarantee the right to develop parcels upon completion of the sewer, but rather once the parcel is eligible to connect to the sewer system. As described above, the key threshold before wastewater service can be provided to any undeveloped property is certification of an updated Los Osos portion of the Estero Area Plan by the Coastal Commission.

<sup>8</sup> See appeals A-3-SLO-21-0002 (Asquith), A-3-SLO-21-0003 (Moore); A-3-SLO-21-0004 (Wise); A-3-SLO-21-0005 (Marc Kimbell); A-3-SLO-21-0006 (Salter); A-3-SLO-21-0007 (Bodine and Townsend); A-3-SLO-21-0008 (Robertson); and A-3-SLO-21-0009 (Lorenzo). The applicants in A-3-SLO-21-0002 (Asquith), A-3-SLO-21-0003 (Moore), A-3-SLO-21-0006 (Salter), and A-3-SLO-21-0009 (Lorenzo) have since signed a document that states they are withdrawing the local applications that were approved by the County, and acknowledging that the County's approvals are null and void and of no further force and effect, that they will no longer pursue these projects before the California Coastal Commission, and thus that the appeals in those cases are moot. On March 12, 2021, the Commission found that appeals A-3-

did not make any findings with regard to the adequacy of water supply or wastewater service for the project, did not provide an analysis regarding the approved project's estimated water use or sewage disposal requirements, and did not make any findings with regard to the project's consistency with Public Works Policy 1. In other words, the County's approval is void of any analysis of the LCP's water supply or wastewater service provisions.

As explained above, CZLUO Section 23.04.430 states that a "permit for new development that requires water or disposal of sewage shall not be approved unless the applicable approval body determines that there is adequate water and sewage disposal capacity available to serve the proposed development." Likewise, a lack of either water or sewage disposal is grounds for denial of a project and the LCP requires the County to make a finding that there is adequate water availability and sewage disposal capacity to serve the development. Thus, the County must find that there is adequate water and sewage disposal capacity to serve any proposed development prior to approval.

With respect to sewage disposal, as explained above, Special Condition 6 of CDP A-3-SLO-09-055/069 prohibits the LOWWP from providing new service connections until the LCP has been amended to establish sustainable buildout in Los Osos. Due to the long-standing and well documented public services constraints within the community, the Commission has previously found that the prohibition on new wastewater service applies to new development on completely vacant parcels, as well as to projects that include significant intensifications of use, significant expansions on already developed properties, or where the property owners previously purchased wastewater or water saving credits. Here, the proposed project includes an entirely new residential unit that will intensify and expand the existing use. If the County were to connect the project to the LOWWP, the County would be in violation of CDP A-3-SLO-09-055/069 and subject to enforcement proceedings.

Moreover, the RWQCB prohibits individual septic systems in this area due to the high likelihood of groundwater contamination, and thus the Applicant is prohibited from installing septic systems as a means for sewage disposal for the project. The project cannot legally connect to the LOWWP or install a septic system. Thus, the project lacks wastewater service, and the LCP requires denial of the project. Until the EAP is updated to identify sustainable buildout limits in Los Osos and Special Condition 6's prohibition on sewage service to undeveloped properties (or developed properties where a second residential use is proposed) is lifted, the current project cannot be found consistent with the LCP (namely Public Works Policy 1 and CZLUO Section 23.04.430), and the County is prohibited from providing such services to these properties by the Commission's LOWWP CDP. Thus, the County's approval raises a substantial issue of LCP

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SLO-21-0004 (Wise), A-3-SLO-21-0005 (Marc Kimbell), A-3-SLO-21-0007 (Bodine and Townsend), and A-3-SLO-21-0008 (Robertson) raised a substantial issue of conformance with the LCP and took jurisdiction over the CDP applications for these projects. The de novo hearings on these project applications will be scheduled for a future Commission hearing.

conformance with regard to whether there is adequate sewage disposal capacity to serve the development.

With respect to adequate water, Los Osos' entire water supply is extracted from a groundwater basin that has long suffered from overdraft conditions. Excessive groundwater pumping has led to seawater intrusion, water contamination, and adverse impacts to sensitive habitats. As explained above, one of the main reasons the Commission included Special Condition 6 in the LOWWP CDP was because the County had not completed a comprehensive analysis of, and did not have enough information to identify, a sustainable level of growth in Los Osos that could be served by adequate water without depleting the groundwater basin and causing other adverse impacts to coastal resources. Although not yet certified by the Commission, the County's recently submitted (but not filed) Community Plan update recommends that no residential units be permitted and establishes a zero percent annual growth rate until certain water efficiency programs required by the Los Osos Groundwater Basin Plan are completed.

Even if the project had been required to implement water-saving retrofits, the County has not yet developed an approved basin management plan to monitor water supply and reduce extractions accordingly to ensure that such retrofits would actually be effective enough to protect coastal resources. Until that basin management plan (or an equivalent) is in place, which is a critical aspect of the Commission-required Los Osos Community Plan update, there is currently insufficient evidence to support a determination that adequate water exists to serve the development. In this case, the County did not require offsets and has not provided any information as to whether any retrofit opportunities exist or if measures are in place to establish the efficacy of a retrofit program. Accordingly, the approval raises a substantial issue of LCP conformance with regard to whether there is adequate water to serve the development, and thus the County approved project is inconsistent with Public Works Policy 1 and CZLUO Section 23.04.430.

In sum, the County's CDP approval raises a substantial LCP conformance issue with regard to the adequacy of water supply and wastewater services.

### **3. ESHA**

#### *Applicable LCP Provisions and ESHA Background*

The LCP includes a robust policy framework to prevent adverse impacts to ESHA including limiting development within ESHA to resource-dependent uses and prohibiting significant disruptions to ESHA resources. Because significant ESHA resources are known to occur within the County's urban areas, such as Los Osos, the LCP requires the County to create an off-site mitigation program in order to allow for development in more urbanized parts of the County. These policies 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.*

**ESHA Policy 6: Off-Site Mitigation Bank for Urban Development.** *The county shall participate in creating a program (e.g. through the update of area plans) that would allow development to occur on sites in urban areas that contain sensitive species habitat but do not represent long-term viable habitat in exchange for participation in an off-site mitigation program*

With respect to wetlands and 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:

**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.*

**ESHA Policy 7: Protection of Environmentally Sensitive Habitats.** *Coastal wetlands are recognized as environmentally sensitive habitat areas. The natural ecological functioning and productivity of wetlands and estuaries shall be protected, preserved and where feasible, restored.*

**ESHA Policy 20: Coastal Streams and Riparian Vegetation.** *Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological system and ecological function of coastal streams shall*

*be protected and preserved.*

Los Osos is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known as one of the most important biologic and wetland resources in California's coastal zone. The Morro Bay watershed stretches inland to the foothills of the Santa Lucia Range, and a variety of coastal creeks and tributaries (including Los Osos, Warden, Chorro, and Morro Creeks) wend their way from the hills down through Los Osos and to Morro Bay, forming the area's ESHA mosaic.

Most of the Los Osos built environment has been constructed on ancient dunes formed by centuries of wind-blown beach sand that was deposited along the south end of Morro Bay and, as a result, the terrain of Los Osos consists of gently rolling hills and sandy soils, often referred to as "Baywood fines." The sandy soils and marine climate combine to produce a unique coastal ecosystem that is home to a wide array of plant and animal species, some of which are found nowhere else in the world. The dune, bluff, dune scrub, and chaparral communities that comprise this unique coastal ecosystem are all ESHA. The EAP recognizes that areas underlain by these types of soils are "included in the Sensitive Resource Area combining designation and are also an Environmentally Sensitive Habitat." The EAP also includes a map of the Los Osos Dune Sands Sensitive Resource Area, Figure 6-3, which encompasses all of the urban areas of Los Osos and designates the community as ESHA. Since nearly all the urban area of Los Osos is underlain by this same sandy soil that supports ESHA and/or ESHA seed bank, which is mapped as a Sensitive Resource Area and designated as ESHA in the LCP, the rebuttable presumption is that all of the undeveloped land within this area, including in and around existing homes such as the one on the parcel at issue here, is comprised of the same sandy soils constituting ESHA under the LCP. In fact, the entire community has traditionally been recognized as ESHA by the Commission, including due to much of it being USFWS-designated critical habitat for the federally endangered Morro shoulderband snail.<sup>9</sup>

### *Appeal Contentions*

The appeal contends that the County did not make adequate ESHA findings, and further contends that the project does not adequately address ESHA impacts, including because ESHA resources within Los Osos generally need to be protected proactively and comprehensively, including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP). Finally, the appeal contends that the project may lead to impacts to wetland and riparian ESHA due to the community's lack of a groundwater basin management plan and lack of long-term planning for the community's water supply and sustainable buildout capacity, which can be applied to prevent and mitigate for project impacts in that regard.

### *Analysis*

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<sup>9</sup> See, for example, A-3-SLO-98-061 (Wolcott Residences); A-3-SLO-98-087 (Cabrillo Associates); SLOMAJ-2-04 Part 2 (Estero Area Plan Update); A-3-SLO-09-055/069 (Los Osos Wastewater Project); A-3-SLO-11-055 (Kellaway); and A-3-SLO-19-0180 (Shear Development LLC SFDs).

The County-approved project includes the construction of a new second residential unit on a property with an existing home within Los Osos. The Applicant maintains that the new accessory dwelling unit (ADU) and storage structure will occupy an area of the site that is currently occupied by a storage shed and thus not result in any new or additional impacts to ESHA. Notwithstanding the Applicant's claim, the County did not evaluate ESHA issues, did not make any findings regarding ESHA, and did not include any monitoring or mitigation for potential project impacts to ESHA. As a result, the County's action is inconsistent with the LCP's ESHA requirements for a number of reasons.

First, the County did not identify whether ESHA exists here or not. As indicated above, it is the Commission's experience that most of Los Osos constitutes ESHA, including in and around homes, and including due to it being mapped critical habitat for the Morro shoulderband snail, including the subject site. The County did not evaluate any such information in its approval.

Second, if ESHA exists on the site, which seems likely, then the County also did not evaluate whether the residential use proposed is allowed in ESHA. As a rule, residential uses are not resource-dependent and are thus not allowed in ESHA by the LCP. And even if they were, the LCP only allows uses in ESHA that do not disrupt the underlying habitat resource and would also include new impacts to immediately adjacent potential habitat not covered by development. Even if the proposed ADU were to have the exact same footprint as the existing shed, which seems unlikely, the proposed project includes other elements that could further disrupt the underlying resource, including a concrete slab foundation with footings for the ADU, stairs that will be used to gain access to the second floor of the development, a concrete stair landing, and support beams for the second floor deck and storage element. Again, the County did not evaluate nor analyze these issues, so there is a lack of information supporting its approval.

Third, even if the use and amount of disruption were to have been allowed in ESHA by the LCP, the LCP would also require mitigation for any impacts and the County's approval includes none. In fact, LCP ESHA Policy 6 states that mitigation for development within urban areas should be accomplished through a programmatic approach that includes off-site mitigation. Although the County is working with USFWS on an HCP that can help identify appropriate areas for development within the community subject to suitable mitigation to offset the impact of that development, which the Commission has required be a part of the Los Osos Community Plan Update, that update has not yet been certified by the Commission. Thus, even if the County would have required participation in an HCP mitigation program, which it did not, the Commission cannot determine whether the programmatic mitigation required by the LCP adequately offsets potential ESHA impacts as currently required.

Finally, as explained in more detail above, the project would be served by a water supply derived solely from groundwater basin extractions that are known to have caused adverse impacts to Morro Bay watersheds, wetlands, and associated habitats. Until such time that the County develops a groundwater basin management plan (or an equally protective alternative), identifies a sustainable level of growth within the Los

Osos community, and incorporates that planning effort into the LCP via certification by the Commission, any additional development, including the approved residential unit at issue here, may accelerate groundwater basin depletion and lead to adverse impacts to wetland and Morro Bay watershed ESHA. The County also did not evaluate any of these potential impacts.

In short, the County's action here included no ESHA analysis when indicators require same and includes zero supporting documentation to support a finding that the project is consistent with the LCP's ESHA provisions. Thus, the County's CDP approval raises a substantial LCP conformance issue of with regard to the protection ESHA.

#### **4. Second Residential Unit Standards**

##### *Applicable LCP Provisions and Second Residential Unit Background*

The LCP allows for the development of a second permanent residence on certain sites with existing developed homes within the Residential Single-Family, Residential Suburban, and Residential Rural land use categories. However, the LCP limits second residences in certain areas where such units "would create adverse cumulative effects on essential community services and natural features." One area where second residences are limited is Los Osos, also referred to as the South Bay urban area.<sup>10</sup> The LCP states:

***CZLUO Section 23.08.169.c.(1) Excluded areas.*** *A Secondary Dwelling Unit shall not be allowed within the following areas. In such areas, secondary dwelling units are deemed to be incompatible with existing development, or the density increase resulting from secondary units pursuant to this section would create adverse cumulative effects on essential community services and natural features. Such services and features include but are not limited to water supplies, storm drainage facilities, roadway traffic capacities, and soils with limited suitability for septic system sewage disposal or subject to erosion: ...*

***(i) South Bay.*** *The South Bay urban area as defined by the Land Use Element, Estero area plan, except that where the site and secondary dwelling unit satisfy the following provisions, a detached unit may be allowed. ...*

***(a) Within the Residential Single-Family category.***

***(1) Where the site area is 12,000 square feet or larger and the site is served by community water and sewer; or***

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<sup>10</sup> The Estero Area Plan defines the South Bay urban area as the entire Los Osos Valley, an area "bounded by Los Osos Creek on the east, Morro Bay and its tidelands on the north, Irish Hills on the south, and Montaña de Oro and Morro Bay State Parks on the west. Although generally referred to as South Bay, the area consists of several loose-knit neighborhoods, including Baywood Park, Los Osos, and Cuesta-by-the-Sea."

**(2)** Where the site area is one acre (net) or larger and the site is served by community water and on-site sewage disposal; or

**(3)** Where the site area is 2.5 acres (net) or larger and the site is served by on-site water supply and sewage disposal.

For sites where second residences are allowed, the LCP also includes a series of development standards, including:

**CZLUO Section 23.08.169.g. (1).** The following standards apply to all land use categories where secondary dwellings are allowed.

SIZE OF LOT	MAXIMUM SIZE OF UNIT (1)	MAXIMUM DISTANCE FROM PRIMARY UNIT
6,000 sq. ft. - 1 acre.	800 square feet	50 feet
> 1 acre - 2 acres	800 square feet	50 feet
> 2 acres	1,200 square feet	250 feet

**(2) Driveways:** The driveways serving the primary and secondary dwelling shall be combined where possible. An adjustment may be granted in compliance with Section 23.01.044 if combining driveways is prohibited by a physical site constraint, would result in grading on slopes over 15 percent or would require the removal of oak trees or other native trees.

**(3) Within urban and village reserve lines:**

**(i)** The secondary dwelling shall employ a design style compatible with the primary dwelling.

**(ii)** When a secondary dwelling is attached to the primary dwelling, the entrances shall be designed to maintain the character of a single dwelling and to avoid the attached secondary dwelling changing the appearance of the primary dwelling to resemble a duplex. The entrance to an attached secondary dwelling shall not be located on the same building face as the entrance to the primary dwelling unless the entrance to both the primary and secondary dwellings is shared.

**(iii)** No more than 50 percent of the site shall be covered by structures. ...

**h. Parking.** A Secondary Dwelling Unit shall be provided one off-street parking space per bedroom up to a maximum of two spaces, in addition to those required for the primary residence by Section 23.04.166c(5) (Required Parking Spaces - Residential Uses), and such parking space shall be located, designed and constructed pursuant to Sections 23.04.163, 164 and 168, except that for lots of

*7,500 square feet or less, the parking may be located within the front setback and tandem with the parking required for the primary dwelling.*

On January 28, 2020, the County adopted a new Accessory Dwelling Unit (ADU) ordinance to replace the LCP's existing second residence standards. The County-adopted ordinance is intended to reflect state legislation that went into effect on January 1, 2020, which updates local government procedures for review and approval of ADUs and Junior ADUs.<sup>11</sup> The County submitted a request to amend the LCP's secondary dwelling unit standards on September 1, 2020 and Commission staff determined the request was incomplete. Commission staff requested additional information from the County on October 5, 2020, specifically with regard to the adequacy of public services to serve potential ADUs in Los Osos. However, the County has not yet provided a response and the LCP amendment submittal remains incomplete. The locally adopted ADU ordinance is therefore not certified, not operative, and is not the standard of review for coastal permits.

Despite the clear and consistent message from the Commission that the state ADU laws do not supersede certified LCPs in the coastal zone, including in an April 21, 2020 ADU memo that was sent to all local governments (see **Exhibit 5**), the County has started to process CDP applications for ADUs using the uncertified ordinance as the standard of review, and has taken the position that the state ADU law does in fact supersede the certified LCP standards for CDPs. Although the new state ADU laws include provisions that preempt certain local ordinances with respect to ADUs, LCPs are not strictly a matter of local law and instead are extensions of the state Coastal Act policies implemented locally. The ADU law expressly states that the law is not intended to alter or lessen the effect of the Coastal Act, which by extension includes certified LCPs, and the state ADU laws do not preempt certified LCP standards (see California Government Code Section 65852.2(l)). Certified LCPs are thus not superseded by Government Code Section 65852.2 and continue to apply to CDP applications for ADUs until an LCP amendment changing the relevant provisions is adopted. And although the Commission has been encouraging local governments to submit complete updated ordinance packages for Commission review and certification, and has been supportive of facilitating ADUs in urban areas where there are adequate services and where ADUs do not present significant coastal resource challenges, the Commission cannot force local governments to submit same. And unless and until LCP updates are certified, the LCP as currently certified remains the legal standard of review for development,

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<sup>11</sup> Per the recent state law changes, a local ordinance may not require a minimum lot size, owner occupancy of an ADU, fire sprinklers if such sprinklers are not required in the primary dwelling, or replacement off-street parking for carports or garages demolished to construct ADUs. In addition, a local government may not establish a maximum size for an ADU of less than 850 square feet, or 1,000 square feet if the ADU contains more than one bedroom. (see Government Code Section 65852.2(c)(2)(B).) Section 65852.2(a) lists additional mandates for local governments that choose to adopt an ADU ordinance, all of which set the "maximum standards that local agencies shall use to evaluate a proposed [ADU] on a lot that includes a proposed or existing single-family dwelling." (Government Code Section 65852.2(a)(6).)

including ADUs. As such, this report analyzes the project for consistency under the standards set by the certified LCP.

On this point it is further noted that even the County's uncertified ADU ordinance expressly states that nothing in the ordinance "shall exempt accessory dwellings from meeting any applicable Local Coastal Plan policies," which would include the public services and ESHA policies explained above. Thus, even if the uncertified ordinance could be used as a standard of review, which it cannot, this project would still need to be consistent with all other LCP coastal resource policies, which it is not.

#### *Appeal Contentions*

The appeal contends that the County failed to use the proper standard of review, because it applied an uncertified ordinance rather than existing LCP standards. Moreover, the appeal contends that the County-approved project is inconsistent with existing secondary dwelling unit standards.

#### *Analysis*

The County-approved project includes the construction of a new 309 square-foot, two-story second residential unit (i.e., 159 square feet of living space and 150 square feet of storage space) on a 6,250-square-foot lot currently occupied by an existing approximately 1,170-square-foot, two-story home within Los Osos. The County found that the project is inconsistent with the LCP's required rear and side yard setbacks because the approved unit has rear and side yard setbacks of four feet and the LCP's minimum yard requirements are 10 feet and 5 feet, respectively. The County also found that the project site does not meet the minimum lot size requirement necessary to allow consideration of a second residence at all; namely the lot in question must be at least 12,000 square feet in size. However, the County found that the certified LCP standards are superseded by the new state law requirements and approved the project even though the County acknowledged that it was not consistent with the LCP.

Likewise, in a letter dated March 18, 2021, the Applicant insists that any reference to minimum lot requirements is both incorrect and misplaced as current State law has precluded local jurisdictions from imposing said restrictions. However, as noted above, the certified LCP standards are not superseded by the new state ADU laws and the current LCP second residential unit standards remain the legal standard of review for this CDP application. The County found that the project was inconsistent with the LCP because the project does not meet the LCP's minimum rear and side yard requirements and the project site does not meet the LCP's minimum lot size requirement to allow for a second residence on this already developed property. Thus, even if the approved project were re-sited to comply with LCP yard setbacks and all other development standards, the LCP currently would not allow such development on the project site. The subject 6,250-square-foot lot is little more than half the required 12,000 square foot minimum size that would be required by the LCP to even allow consideration of a second residence in this case.

Because the County utilized the incorrect legal standard of review in analyzing the CDP application for the project, and because the project is inconsistent with the certified

LCP's second residential unit provisions, the County's CDP approval raises a substantial LCP conformance issue with regard to these provisions.

## 5. 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: 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 most heavily in favor of finding substantial issue. The County found the development consistent with applicable LCP water supply and wastewater capacity policies without adequate factual or legal support. In terms of legal support, the County did not analyze whether the project is consistent with the terms and conditions of the LOWWP CDP (which was specifically approved by the Commission to provide wastewater service for development within the Los Osos area, and is specifically conditioned to prohibit provision of wastewater service for new development). The County then failed to make any factual findings about the state of the groundwater basin in terms of adequate water supply. Similarly, the County did not provide any ESHA analysis to support a finding that the project was consistent with the LCP's ESHA provisions. Moreover, the County erroneously concluded that the state ADU law supersedes certified LCP policies, which is not accurate (nor supported by caselaw). Thus, the County has not provided adequate factual or legal support for its decision to allow the project in an area where public services are known to be inadequate, where ESHA is known to be prevalent, and where the County even acknowledges that the project is inconsistent with the LCP's second residential unit provisions. This factor, on its own, weighs heavily enough to support a determination that the appeals raise a substantial issue.

Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of substantial issue because the project would result in new residential development in an area that is generally subject to a rebuttable presumption of constituting ESHA. Thus, given the strict resource protections for ESHA reflected in the LCP, any amount of non-resource dependent development (such as

the residential development here) raises a substantial issue with respect to LCP consistency. In addition, the approved project allows a new residence in an area where public services are scarce, the planning for how best to allot them is incomplete (namely through the required LCP amendment through the Los Osos Community Plan), and the County is actually prohibited from providing wastewater service altogether. Taken together, the extent and scope of development here supports raise a substantial issue.

Regarding the third factor, the proposed project is located in an area where the depletion of groundwater adversely affects significant coastal resources. Resources such as wetlands, the Morro Bay estuary and its watershed are being negatively impacted due to a lack of water supply and impacts from seawater intrusion. As discussed above, the Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known as one of the most important biologic and wetland resources in California's coastal zone. Therefore, the significance of the coastal resources affected here supports a finding of substantial issue as well.

Regarding the fourth factor, because the project raises such important coastal resource protection concerns, allowing the LCP to be interpreted to allow for new residential development in areas without adequate public services and inconsistent with second residential unit standards, a finding of no substantial issue would create an adverse precedent for future interpretation of the LCP. Such a precedent could potentially lead to significant new development in an area with well-known and dire public service constraints, and ESHA constraints. Further, allowing the approval of the project to be based on an uncertified LCP amendment that directly conflicts with the certified LCP would set a precedent that would undermine the entire LCP amendment process. Therefore, the fourth factor also supports a finding of substantial issue.

Finally, regarding the fifth factor, the project raises issues of regional and statewide significance due to the recent past history of statewide drought (which could recur) as such conditions relate to water availability, the importance of groundwater resources in San Luis Obispo County and Los Osos, and growth-inducing development issues in the Los Osos community and in the County more broadly. Thus, the fifth factor also supports a finding of substantial issue. In short, the County-approved project does not adequately address LCP coastal resource protection requirements, and the five factors on the whole support a finding of substantial issue.

For the reasons stated herein, the Commission finds that Appeal Number A-3-SCO-21-0020 raises substantial LCP conformance issues in terms public services, ESHA, and second residential unit standards. 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.

### 3. APPENDICES

#### **A. Substantive File Documents<sup>12</sup>**

- File for Coastal Development Permit Appeal Number A-3-SLO-21-0020

#### **B. Staff Contact with Agencies and Groups**

- San Luis Obispo County Planning and Building Department

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<sup>12</sup> These documents are available for review in the Commission's Central Coast District office.