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# Th12c

Appeal Filed: 3/03/2021  
Action Deadline: 5/12/2021  
Staff: Mike Watson - SC  
Staff Report: 4/2/2021  
Hearing Date: 4/15/2021

## STAFF REPORT SUBSTANTIAL ISSUE & DE NOVO HEARING

**Appeal Number:** A-3-SLO-21-0019  
**Applicant:** Sandy Bean  
**Appellant:** Cecile Surbeck  
**Local Government:** San Luis Obispo County  
**Local Decision:** County coastal development permit number DRC2016-00112 approved by the San Luis Obispo County Planning Department on February 2, 2021.  
**Project Location:** 1230 Los Olivos Avenue within the unincorporated community of Los Osos in San Luis Obispo County (APN 074-293-015).  
**Project Description:** Authorize the establishment of a temporary off-site construction storage yard and vehicle storage area. Development includes a crushed base rock surface, drainage, and fencing.  
**Staff Recommendation:** Substantial Issue Exists; Denial

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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 those 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, 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 the substantial issue determination (unless that portion of the hearing has been postponed), at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

### SUMMARY OF STAFF RECOMMENDATION

The County approved a Coastal Development Permit (CDP) for a temporary construction storage yard at an undeveloped and vacant 1.18-acre property in the unincorporated Los Osos area of San Luis Obispo County. The Appellant contends that the County-approved project is inconsistent with multiple San Luis Obispo County Local Coastal Program (LCP) provisions, including those related to allowable uses of the site (particularly in light of potential habitat for special status plant and animal species such as the federally endangered Morro shoulderband snail), and also related to neighborhood compatibility, public views, air quality, noise, and traffic.

The County-approved use here is not allowed by the underlying LCP land use designation that applies to this site. In fact, the County even acknowledged as much in its approval, but approved the project even so because it concluded that there exists a community need for this type of use. Whether that is true or not (and whether there are different land use categories that can support such a use consistent with the LCP) is immaterial to this appeal because "community need" is not the required allowable use test under the LCP. Therefore, the County-approved project is not an allowable use.

In addition, the site is mapped as an Environmentally Sensitive Habitat Area (ESHA) in the LCP, and project materials note that it contains constituent habitat for the federally endangered Morro shoulderband snail. Another rare species, Kellogg's horkelia, is also present. Only resource-dependent uses that do not significantly disrupt the ESHA resource are allowable in ESHA. The County-approved project fails both tests. First, temporary construction storage is not dependent on the ESHA habitat resource here to exist. On the contrary, construction storage can take place any number of locations, such as developed paved parking lots, indicating that the use is not resource dependent. Second, the County-approved project would cover approximately three-quarters of the roughly 1.18-acre site in base rock, and then place equipment and vehicles atop this base rock. This would be a significant disruption to the ESHA because it would cause a complete loss of the underlying habitat. Even if that type of use and that level of impact could be allowed by the LCP in ESHA, which it cannot, the County's approval of the project does not include the LCP-required monitoring of and mitigation for ESHA impacts either.

And finally, although the area around the project site is not homogenous but rather is a mix of single-family and multi-family residential, storage, and other commercial uses, the County-approved project would clearly detrimentally change the character of the area, and would change a large open space area into a fenced in storage yard. Such impact would be exacerbated because the site is comparatively larger than others in the neighborhood.

Thus, 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. For the same reasons, staff further recommends that the Commission deny that CDP application. The above-described inconsistencies cannot be corrected by conditions of approval, including because the use proposed is not allowed in this land use designation category, is not allowed in EHSA, and would result in adverse public view, community character, and other neighborhood compatibility impacts. The motions and resolutions to effect this recommendation are found on page 5.

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EXHIBITS

Exhibit 1 – Location Maps

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

Exhibit 3 – Appeal of County’s CDP Decision

CORRESPONDENCE

## 1. MOTIONS AND RESOLUTIONS

### A. Substantial Issue

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-21-0019 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-21-0019 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.*

### B. CDP Application

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

*Motion: I move that the Commission approve Coastal Development Permit Number A-3-SLO-21-0019 for the development proposed by the applicant, and I recommend a no vote.*

*Resolution to Deny CDP: The Commission hereby denies Coastal Development Permit Number A-3-SLO-21-0019 on the grounds that the development will not be in conformity with the San Luis Obispo County Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

## 2. FINDINGS AND DECLARATIONS

### A. Project Location and Description

The County-approved project is located at 1230 Los Olivos Avenue in the unincorporated community of Los Osos, on a vacant lot south and east of the Morro Bay estuary. Los Osos is a 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. 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. 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 San Luis Obispo County Local Coastal Program (LCP) Land Use Plan (LUP) designates the approximately 1.18-acre site for Office and Professional use, and it is currently undeveloped and vacant. The County-approved project includes the establishment of a temporary (i.e., authorized through 2024) construction storage and vehicle storage area with six-foot-tall solid perimeter fencing around a hardened base made up of six inches of crushed base rock across the entirety of the site. After the three-year period, the site would be restored to its original state. See **Exhibit 1** for a location map and **Exhibit 2** for the County-approved project plans.

### B. San Luis Obispo County Approval

On September 18, 2020, the San Luis Obispo County Planning Department approved a CDP for the project, and that approval was appealed to the County Board of Supervisors by the Appellant. On February 2, 2021 the Board denied the appeal and upheld the Planning Department's decision to approve County CDP DRC2016-00112 for the proposed development. The County's Notice of Final CDP Action was received in the Coastal Commission's Central Coast District Office on February 17, 2021 (see **Exhibit 2**). The Coastal Commission's ten-working-day appeal period for this action began on February 18, 2021 and concluded at 5pm on March 3, 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.<sup>1</sup> 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

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<sup>1</sup> The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (California Code of Regulations, Title 14, Section 13115(b)). 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 the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

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 on the appeal.

In the second phase of the appeal (only if the Commission finds a substantial issue in the first appeal phase) 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**

The appeal contends that the County-approved project is inconsistent with multiple San Luis Obispo County LCP provisions, including those related to allowable uses of the site (particularly in light of potential habitat for special status plant and animal species such as the federally endangered Morro shoulderband snail), and also related to neighborhood compatibility, visual resources, air quality, noise, and traffic. See **Exhibit 3** for the Appellant's contentions.

#### **E. Substantial Issue Determination**

##### **1. Allowable Land Use**

###### ***Applicable LCP Provisions***

The San Luis Obispo County LCP is divided geographically into four areas,<sup>2</sup> each with its own LCP area plan. The LCP also includes a Land Use Plan (LUP), titled the Coastal Zone Framework, and an Implementation Plan (IP), titled the Coastal Zone Land Use Ordinance (CZLUO), which are applicable throughout all LCP four areas. The subject property is located within the area governed by the Estero Area Plan. The Estero Area Plan includes an extensive policy framework meant to protect the area's rich coastal resources, including via designation and identification of allowable land uses.

The project site falls under the Office and Profession land use designation. LUP Chapter 6 (Land Use Categories and Allowable Uses) identifies three uses within the Office and Profession land use designation that are relevant to the County-approved

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<sup>2</sup> The County's four LCP areas are: North Coast, Estero, San Luis Bay, and South County.

project, including Accessory Storage (S-16), Temporary Construction Yard (S-17), and Vehicle Storage (S-13).<sup>3</sup> As highlighted by the “S” designation, the identified uses in this case are allowed only when special standards or permit procedures are followed. Those standards and procedures are identified in the CZLUO and state:

**CZLUO Section 23.08.020 – Accessory Uses (S-16).** *Accessory uses are customarily incidental, related and subordinate to the main use of a lot or building and do not alter or change the character of the main use. The standards in the following sections apply to storage that is accessory to a principal use, and other accessory uses such as Home Occupations. (These uses are identified by Coastal Table O, Part I of the Land Use Element as S-16 uses). The special standards for accessory uses are organized into the following sections: ...*

**CZLUO Section 23.08.024 - Accessory Storage.** *Where the principal building or use on a site is some use other than storage, and storage accessory to that use is also located on the site, the accessory storage is subject to the following standards (see also Section 23.08.146, Storage Yards). ...*

**CZLUO Section 23.08.240 - Temporary Uses (S-17).** *Land uses and activities of a temporary nature are defined by the Land Use Element under temporary construction yards, temporary dwellings or offices and temporary events. When designated as allowable, S-17 uses by the Land Use Element, such uses are subject to the provisions of the following sections: ...*

**CZLUO Section 23.08.244 - Temporary Off-Site Construction Yards.** *A storage yard for construction supplies, materials or equipment for temporary use during a construction project (which may include a temporary office pursuant to Section 23.08.246d) is allowable on a site not adjacent to the construction site subject to the provisions of this section. The temporary storage of construction materials on or adjacent to a construction site is subject to Section 23.08.024a (Accessory Storage - Building Materials and Equipment).*

**a. Permit requirement:** *A temporary construction yard may be authorized by the same Development Plan approval which allows the project being served by the construction yard; or through Minor Use Permit approval in all other cases.*

**b. Site design standards:** *To be determined through the review and approval process for either the project Development Plan proposals, or through the Minor Use Permit approval, in addition to the site design standards as set forth in Section 23.08.146c (Storage Yards - Site Design Standards).*

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<sup>3</sup> The letter "S" means that a use is allowable in a particular land use category only when special standards or permit procedures are followed. The number after the "S" refers to the key use charts, which explains where to look in the CZLUO to find the special standards.

**c. Site restoration required:** *The site of a temporary construction yard shall be restored to its original vegetative and topographic state within 30 days after completion of construction. Proper site restoration within another period of time shall be approved by the Planning Director. Prior to establishment of the use, all site restoration shall be guaranteed as set forth in Section 23.02.060 (Guarantees of Performance).*

**CZLUO Section 23.08.280 - Transportation, Utilities and Communication (S-13).** *Transportation and Public Utility Facilities identified as allowable, S-13 uses by the Land Use Element (see Coastal Table 0, Part I of the Land Use Element) are subject to the following sections: ...*

**CZLUO Section 23.08.290 - Vehicle Storage.** *This section applies to commercial parking lots, garage and other establishments engaged in the storage of vehicles for a fee or without fee as a principal use, whether owned and operated publicly or privately. (The storage of vehicles for sale is subject to Section 23.08.144 (Sales Lots).)*

**a. Limitation on use.** *Vehicle storage establishments in the Commercial Retail and Office and Professional categories are to be limited to the temporary parking of automobiles, busses and self-propelled recreational vehicles.*

**b. Permit requirements.** *Minor Use Permit approval.*

**c. Minimum site area.** *10,000 square feet.*

**d. Access.** *From a local street or greater.*

**e. Development standards.** *The design and development of parking areas is to be in accordance with Sections 23.04.160 et seq. (Parking), except that indoor parking facilities where all parking maneuvers are performed by attendants may use tandem parking.*

In addition, the LUP provides a definition of “Temporary Construction Yards:”

**Temporary Construction Yards.** *A storage yard for construction supplies, materials or equipment, located on a site other than the construction site itself or immediately adjacent to it, for use only during the actual construction of a project.*

### **Appeal Contentions**

The appeal contends that the uses authorized by the County-approved project are inconsistent with the list of allowable uses identified in the Office and Professional land use category of the LUP. More specifically, the appeal maintains that the County-approved project cannot reasonably be described as a temporary offsite construction yard because it is not associated with a particular construction project. The appeal further maintains that the County-approved project is inconsistent with CZLUO standards for accessory storage facilities, and that the County improperly characterized

the project as “temporary” by arbitrarily limiting the CDP to three years in an attempt to make the requisite findings for approval of a temporary offsite construction yard.

### **Analysis**

The County-approved project description is the establishment of a *temporary off-site construction storage yard to be used for unidentified local projects and vehicle storage*. The only way the project is allowable on this site is if it meets the requirements of the Accessory Storage (S-16), Temporary Construction Yard (S-17), or Vehicle Storage (S-13) uses, as described above. The County-approved project does not meet these requirements and does not constitute any of these uses.

First, in terms of Accessory Storage (S-16) uses, the project does not meet the requirements of the IP because it is not storage accessory to (1) the principal building or (2) use on the site, as required by Section 23.08.024. In terms of the former, it is an undeveloped site and there is no principal building on it. And in terms of the latter, there is no established principal use on the site for the project to be an accessory to. And even if the principal use were to be considered undeveloped land, open space, or some other description attributable to its vacant and undeveloped status, the storage approved by the County cannot be considered “customarily incidental, related and subordinate to the main use of a lot or building and does not alter or change the character of the main use” as would be required by Section 23.08.020. On the contrary, the proposed storage use that would cover the entire site is not incidental, related or subordinate to that undeveloped “use” because it would completely alter and change the character of the site, making it no longer vacant. The County-approved project is not an Accessory Storage use.

Second, regarding the “Temporary Construction Yard” use, the LCP clearly refers here to construction yards associated with an *actual* construction project. Section 23.08.044 state that it constitutes “a storage yard for construction supplies, materials or equipment for temporary use during a construction project.” The County-approved project is not associated with any actual construction project. It is more aptly described as a commercial storage operation where the Applicant would offer storage yard services for a fee to others. Further, the temporary nature of an LCP-allowed construction yard is intended to track the actual construction project with which it is associated, requiring restoration “within 30 days after completion of construction”. This requirement cannot be met by the proposed project because there is no construction project with which it is associated. The three-year project duration unassociated with any particular construction project is not what was contemplated by the LCP and cannot be used to meet the LCP’s requirements. A temporary construction yard is “for use only during the construction of a project” and there is no construction project here. The County-approved project is not a “Temporary Construction Yard” use.

And third, with respect to the Vehicle Storage use, Section 23.08.290 states that it “applies to commercial parking lots, garages, and other establishments engaged in the storage of vehicles for a fee or without fee as a principal use.” Here, as described above, such vehicle storage in the Office and Profession land use category is not a principally permitted use, but rather is a conditional use in that category, failing the

principal use test. Further, even if it did not fail that test, such vehicle storage is just part of a larger construction storage use that is not allowed, as described above. Under Section 23.08.290, such vehicle storage is “limited to the temporary parking of automobiles, busses and self-propelled recreational vehicles.” Here, the County’s approval restricted vehicle storage to trucks with a gross vehicle weight of one ton or less, which arguably is not one of the categories specified. The County-approved project is not a Vehicle Storage use.

The County’s approval acknowledged that the project was technically not consistent with the LCP’s allowable use restrictions because it was not associated with an actual construction project, but approved it even so because of a conclusion that there exists a community need for this type of use. Whether that is true or not (and whether there are different land use categories that can support such a use consistent with the LCP) is immaterial because “community need” is not the standard of review under the LCP. And here, as described above, the County-approved project is not an allowable use in the Office and Profession land use category. Thus, the County’s CDP approval raises a substantial LCP conformance issue of with regard to allowable land use.

## **2. Environmentally Sensitive Habitat Areas**

### ***Applicable LCP Provisions***

The LCP includes a robust policy framework to prevent adverse impacts to environmentally sensitive habitat areas (ESHA). ESHA Policy 1 limits development within ESHA to resource-dependent uses and prohibits significant disruptions to ESHA resources. ESHA Policy 2 requires development in or near ESHA to “demonstrate that there will be no significant impact on sensitive habitats” and requires: “a) the maximum feasible mitigation measures (where appropriate), and b) a program for monitoring and evaluating the effectiveness of mitigation measures” as conditions of approval. Because significant ESHA resources are known to occur within the County’s urban areas, such as Los Osos, ESHA Policy 6 requires the County to create an off-site mitigation program in order to allow for development in urban areas that may not serve as long-term viable habitat in consideration of permanent protection of off-site ESHA. These policies state:

***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*

### **Appeal Contentions**

The appeal asserts that the County-approved project could have potentially significant impacts on biological resources, including to native plants and the Morro shoulderband snail. In addition, the appeal alleges that the County did not make adequate ESHA findings, instead asserting that because the property did not contain Morro shoulderband snails during site visits, no biological mitigations or monitoring were warranted. The appeal further contends that the project does not adequately address ESHA impacts 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).

### **Analysis**

Los Osos is located directly adjacent to Morro Bay, which is a designated State and Federal Estuary that is well known as one of the most important biologic and wetland resources in all the California 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 Estero Area Plan 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 Estero Area Plan 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 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>4</sup>

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

The County indicated that the project site does not constitute ESHA because no Morro shoulderband snails or shells were observed on the lot during an April 2014 biological resources survey. However, the LCP definition of ESHA includes any area that supports habitat for rare and valuable plant or animal life, not just areas that contain individual specimens of sensitive species. The project site contains Baywood fine soils, which have consistently been found in nearby restoration projects and field surveys to provide conducive habitat for Morro shoulderband snails. In addition, the County determined that Kellogg's horkelia is present on the site. This native plant species is classified by the California Native Plant Society (CNPS) as 1B.1 (meaning it is rare and seriously endangered in California) with an S.1 state ranking (meaning it is critically imperiled). The Commission typically considers habitat for and individual specimens of so ranked CNPS species to be ESHA as well.<sup>5</sup>

Thus, and irrespective of the maps designating the project site as ESHA or past Commission observations which also found the entire area to be ESHA, site-specific evaluation indicates that the project site provides habitat for rare and valuable species, including an endangered species, and therefore constitutes ESHA for these reasons as well. Absent compelling evidence to the contrary (and no such evidence has been demonstrated), the Commission must err on the side of caution and evaluate the site as ESHA.

The only uses allowed in ESHA are resource-dependent uses that do not significantly disrupt the ESHA resource. The County-approved project fails both tests. First, temporary construction storage is not dependent on the ESHA habitat resource. On the contrary, construction storage can take place in any number of places, such as

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<sup>4</sup> See, for example, A-3-SLO-98-061 (Wolcott Residences); A-3-SLO-98-087 (Cabrillo Associates); SLO-MAJ-2-04 Part 2 (Estero Area Plan Update); A-3-SLO-09-055/069 (Los Osos Wastewater Project); A-3-SLO-11-055 (Kellaway); and A-3-SLO-19-0180 (Shear Development LLC SFDs).

<sup>5</sup> And instead of protecting the Kellogg's horkelia on site, the County approval allows for specimens to be relocated to the northern boundary of the site to facilitate construction of the construction storage yard.

developed paved parking lots, indicating that the use is not resource dependent. Second, the County-approved project would cover approximately three-quarters of the roughly 1.18-acre site in base rock, and then place equipment and vehicles atop this base rock. This would cause a complete loss of the underlying habitat and is axiomatically a significant disruption to it. Even if that type of use and that level of impact could be allowed by the LCP in ESHA, which it cannot, the project does not include the LCP-required monitoring of and mitigation for ESHA impacts either.<sup>6</sup>

In short, the County's action here included no ESHA analysis when indicators require it and includes no 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.

### **3. Public Views and Community Character/Other**

#### ***Applicable LCP Provisions***

The LCP protects public views and community character through a variety of provisions, including (in relevant part):

***Land Use Element (LUE) Goal 1.*** *Reconcile discordant land uses by identifying the relationships between uses that minimize land use conflicts.*

***CZLUO Section 23.04.010 Purpose.*** *This chapter establishes to standards for the design and layout of sites for land uses, new developments and divisions of land, where allowed by the Land Use Element. The purpose of these standards is to support, through careful site evaluation and design, the establishment of land uses in a manner that is compatible with existing land uses and neighborhoods; the natural environment; the economic viability of the county; and the health and safety of county residents. ...*

***LUE Commercial Land Uses.*** *Designate commercial and/or industrial areas that are compatible with overall land use by: ...*

- b.*** *Creating and preserving desirable neighborhood business characteristics, such as compatible uses, safe employment areas, sense of scale, landscaping, pedestrian ways, and other amenities.*

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<sup>6</sup> LCP ESHA Policy 6 states that mitigation for development within urban areas should be accomplished through a programmatic approach that includes off-site mitigation. The County is currently in the midst of creating such a program for Los Osos, in the form of an HCP that will identify the appropriate areas for development within the community and will also identify suitable mitigation to offset the impact of that development. Until such time as the HCP (or an equally protective alternative) is complete and the program is incorporated into the LCP via the Los Osos Community Plan, as required, individual project-level mitigation may not adequately offset potential ESHA impacts as required, and in this case, as stated above, the County required no such mitigation. Without a programmatic approach to offset development impacts within Los Osos, or at a minimum project-level evaluation, monitoring and mitigation, the approval raises a substantial issue of LCP conformance with regard to terrestrial ESHA impacts on this point alone.

**4. LUE Residential Land Uses.** *Preserve and enhance the quality of residential areas by: ...*

- c. Protecting residential areas from incompatible and undesirable land uses.*
- d. Preserving desirable neighborhood characteristics such as compatible uses, open views and yard areas, sense of scale, landscaping, pedestrian ways, and other amenities.*

**Air Quality Policy 2.** *Preserve, protect and improve the air quality of the County by: ...*

- a. Mitigating to the extent feasible, potential adverse air quality impacts from new development using the best available technology.*

**Appeal Contentions**

The Appellant contends that the project will change the general character of the neighborhood and that it is incompatible with the surrounding properties, which are primarily single- and multi-family residences. The appeal further contends that the County-approved project will lead to adverse impacts on air quality, scenic quality, noise, and traffic, and that it will be inconsistent with neighborhood compatibility by introducing an incompatible use.

**Analysis**

Regarding the Appellant's neighborhood compatibility contention, the site is part of the Office and Professional land use district that lies between the Commercial Services district to the west and Residential/Multi-Family district to the east, and serves as a buffer of sorts between the two areas. The site is surrounded on three sides by residential development. Indeed, the entire block east of Fairchild Way is occupied by residential development, whereas commercial development dominates the properties west of Fairchild Way. The County-approved construction and vehicle storage yard would be the only non-residential use on the entire block between Mountain View Drive and Fairchild Way.

At the same time, it is clear that the broader area is not homogenous but rather is a mix of single-family and multi-family residential, storage, and other commercial uses. Thus, while it would be incongruous as an allowable land use, it is possible that the approved storage yard, were it to otherwise be approvable, could satisfactorily blend into the broader area. The six-foot-tall solid fencing around the site would be less visually inviting than the yards associated with residential development, for example, but there are similar examples nearby (including a fenced-in storage facility to the west across Fairchild Way). That said, it would clearly detrimentally change the character of the area and would transform a large open space area into a fenced in storage yard. The facility opposite Fairchild Way gives a sense of what that might look like and it seems that the County-approved project here would serve to push the "look" of the neighborhood well towards a more industrial character. Such impact is exacerbated because the site is comparatively larger than others in the neighborhood, which would only further its

impact.<sup>7</sup> In short, the County-approved project would lead to a series of public view and community character problems, including because it is not an allowed use on this site in the first place, and that alone foundationally means it is not compatible. Thus, the County's CDP approval raises a substantial LCP conformance issue regarding public views, community character, and other issues of neighborhood compatibility.

#### **4. Substantial Issue Conclusion**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, 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 the applicable LCP land use designation without adequate factual or legal support. In fact, the County found that the project was technically not consistent with the underlying land use designation but approved it even so. Additionally, the County-approved project does not meet the definition of "Temporary Construction Yard," which involves actual association with a construction project. The County-approved project also would not qualify as accessory storage or as vehicle storage. Further, the County did not provide any ESHA analysis, mitigation, or monitoring to support a finding that the project was consistent with the LCP's ESHA provisions. Thus, the County has not provided adequate factual or legal support for its decision to approve the project because it is inconsistent with the underlying land use designation, where ESHA is known to be prevalent, and where the County even acknowledges that the project is inconsistent with the LCP's land use provisions. This factor, on its own, weighs heavily enough to support a determination that the appeal raises a substantial issue.

Regarding the second factor, the extent and scope of the development as approved by the County is significant because it would result in new development in an area that is

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<sup>7</sup> And it typically includes types of noise, traffic, and other by-products that are not contemplated in this land use category.

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 development here) supports a finding of substantial issue under the second factor.

Regarding the third factor, the proposed project is located in an area where development adversely affects significant coastal resources. Resources such as ancient dunes, dune scrub, and chaparral communities that together comprise this unique coastal ecosystem (ESHA) would be negatively impacted by the project. And, as discussed above, the Los Osos community is located directly adjacent to Morro Bay, which is a designated State and Federal 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, allowing the LCP to be interpreted to allow for a construction and vehicle storage yard in an area where it is not an allowable use and where the area is also ESHA would create an adverse precedent for future interpretation of the LCP. Such a precedent could potentially lead to significant new prohibited uses and activities, including development in areas with well-known ESHA constraints. These are also statewide issues of concern. Therefore, the fourth and fifth factors also support a finding of substantial issue.

In short, the County-approved project does not adequately address LCP coastal resource protection requirements, and each of the five factors supports a finding of substantial issue. For the reasons stated herein, the Commission finds that Appeal Number A-3-SCO-21-0019 raises substantial LCP conformance issues with respect to the County-approved project's conformance with the certified San Luis Obispo County LCP and takes jurisdiction over the CDP application for the proposed project.

## **F. CDP Determination**

### ***Analysis***

For the same reasons as detailed in the above substantial issue determination findings (which are incorporated herein by reference), the proposed project is inconsistent with the LCP. These inconsistencies cannot be fixed by conditions of approval for several reasons. First, the proposed use is not an allowed use in this land use designation category. The project also cannot be found consistent with the LCP's conditional uses in this land use designation category. Second, the proposed project cannot be found consistent with the LCP's ESHA requirements because it is not dependent on the habitat resource and would significantly disrupt the habitat even if it could be found to be dependent. Third, the proposed project would result in adverse public view, community character, and other neighborhood compatibility impacts that are inconsistent with the LCP. Thus, the Commission denies CDP Application Number A-3-SCO-21-0019.

**G. 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 Planning Department, acting as lead CEQA agency, determined that the proposed project was categorically exempt from CEQA review pursuant to Section 15301 (as a minor alteration to existing facility with no expansion of use), and thus the Planning Department did not identify any significant adverse environmental effects from the proposed project.

Pursuant to CEQA Guidelines 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 that 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. Accordingly, the Commission’s denial of the CDP application for the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

### 3. APPENDICES

#### **A. Substantive File Documents<sup>8</sup>**

- CDP Appeal Number A-3-SLO-21-0019 File

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

- San Luis Obispo County Planning and Building Department

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<sup>8</sup> These documents are available for review in the Commission's Central Coast District office.