CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT OFFICE
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W13a

ADDENDUM

April 13, 2021

TO: Coastal Commissioners and Interested Parties

FROM: South Central Coast District Staff

SUBJECT: **Addendum to Item W13a, Dispute Resolution No. 4-21-0132-EDD (Sycamore Tennis Court Association) For the Commission Meeting of Wednesday, April 14, 2021**

The purpose of this addendum is to attach and respond to correspondence received since publication of the staff report. One letter of correspondence and one e-mail were received from the City of Malibu Assistant City Attorney. One letter of correspondence was received from Nancy Goldstein, the attorney representing the plaintiffs in the lawsuit between the applicants for this project and the Mountains Recreation Conservation Authority (MRCA) in Los Angeles Superior Court, Case No. SC 126502. One letter of correspondence echoing the argument provided by the City was received. One letter of correspondence from the Surfrider Foundation in support of the staff recommendation was received as well. The correspondence letters are available in the Correspondence tab for the item on the Commission's website.

I. Correspondence Received from City of Malibu Assistant City Attorney; Staff's Response to Correspondence

A. March 30, 2021 Letter

On March 30, 2021, the Commission received a letter from Trevor Rusin, the Assistant City Attorney for the City of Malibu. In his letter, Mr. Rusin argues that the decision before the Commission is simply one of fact: is the proposed project within any of the four categories[1] for Commission-appeal under the Malibu LCP/Coastal Act? Mr. Rusin answers

[1] Those areas are: (1) developments approved by the local government 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 tideline of the sea where there is no beach, whichever is the greater distance; (2) developments approved by the local government not included in subsection (1) that are located 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

this question in the negative stating that it is undisputed that the proposed project is not located within any of these areas. He then contends that Commission staff erroneously applied the definition of "development" to property not owned by the applicant, but which staff believes will be impacted by the proposed project.

According to Mr. Rusin, Commission staff has come to this error by confusing "potential project impacts" with the proposed development and what he calls "potential project impacts" may not be used to determine appealability. Mr. Rusin, argues that "development" is limited to the property of the applicant and, more specifically, to the precise site of the placement the physical development. He contends that to the extent that the development may impact neighboring properties, those "secondary effects" are "impacts of a project," not the project itself. Mr. Rusin worries that that if the definition of "development" were to be applied to properties potentially impacted by a proposed project, it would require the impacted property owners to be co-applicants for the CDP and that this would lead to issues with noticing and provide neighbors with a veto by refusing to join at co-applicants.[2]

Mr. Rusin goes on to state that the City has not yet approved the CDP for the proposed project, and that if it finds adverse impacts to access to public lands, it may deny the CDP. This has no bearing on whether the development is appealable if approved. He also concedes that development requiring a permit is not limited to the placement of physical structures and includes activities that might change the intensity of the use of property.

Staff disagrees with Mr. Rusin's overly formalistic parsing of "development" and "potential impacts caused by development." This interpretation would narrowly define development solely to the exact amount of physical space that the project occupies and any effects it has on solely the owner's property. This is not what the Coastal Act or LCP demand and would require the Commission to blind itself to the obvious purpose of the gate. Namely, to exclude people from the land beyond it (all of which, the applicant does not own), not to simply restrict the space it physically occupies. This is the whole purpose of gates generally and this gate in particular. The proposed project is meant to deny public vehicular and pedestrian ingress to areas that are located within the Commission's geographic appeal jurisdiction (100 feet from Escondido Canyon Creak stream top of bank), such as portions of Via Escondido Road as well as public land and public trails (Coastal Slope Trail and Escondido Falls Trails) currently owned by MRCA north of the proposed gate.

This cannot be reasonably characterized as an unexpected or incidental result of the proposed project. Neither the City or applicants can be surprised that Commission Staff believes that the development extends beyond the precise location of the gate. Mr. Rusin's

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coastal bluff; (3) developments approved by the local government not included within subsections (1) or (2) that are located in a sensitive coastal resource area; and (4) any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map.

[2] In response to Mr. Rusin's argument that this would require all neighbors to be co-applicants, this is not the case, and Commission staff has made no such assertions here. Although development may, as it does here, extend to property not owned by the applicant, the site of the physical structure is on the applicant's property. The change in intensity of use of land and access to water is development only on the properties encumbered by the easement held by MRCA. As such, any owners of land on which the easement is located could be invited to become co-applicants, but they are not required to do so under the requirements of Section 30601.5.

formalistic parsing of “development” and “potential impacts caused by development” of the proposed project is inconsistent with Supreme Court precedent. In *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, the California Supreme Court acknowledged that the Coastal Act requires a coastal development permit for “any development” in the coastal zone. *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794. It held that development includes projects that decrease intensity of use of land, “such as by limiting public access to the coastline,” which is the purpose of the proposed gate. *Id*. at 795.

Mr. Rusin asks the Commission to ignore the obvious intent of the project in such a way that the Coastal Act and LCP do not require. The Legislature did not intend for the Commission’s appellate jurisdiction to be so easily evaded. Under Mr. Rusin’s argument, clever placement of any physical structures that change the intensity of use of land could be beyond the Commission’s appellate jurisdiction, even if the structures limit public access to the coastline in the Commission’s appellate jurisdiction—development that the Supreme Court specifically found requires a coastal development permit.

A similar argument failed in a recent case in the Superior Court of the County of Santa Barbara (*Hair v. County of Santa Barbata*, Case No. 16 CV03775). There, the applicant sought to site a well just outside of the Commission’s appellate jurisdiction, but the well drew water from within the Commission’s appellate jurisdiction. In that case, the petitioners made two arguments: (1) that pumping water from an aquifer is not “development” under the Coastal Act and (2) that no relevant activity will occur within the Commission’s geographical appeals jurisdiction. Like in this case, the petitioners initially sited their well within the undisputed geographic appeals jurisdiction of the Commission and then relocated it in order to evade that jurisdiction. The Court agreed with the Commission that “development” within the meaning of Section 30106 included not just the installation of the proposed well and its physical structure, but also the operation of the well itself. Thus “to the extent that any of those aspects, activities, features (etc.) of the well development occur within the Coastal Commission’s geographic appeals jurisdiction, the Coastal Commission has appeals jurisdiction over them.” The Court observed that other courts have expressly recognized that Section 30106 provides an expansive definition of the activities that constitute development under the Coastal Act and that doing so complies with the mandate set forth in *McAllister v. California Coastal Commission* (2007) 147 Cal.App.4th 253 to construe the provisions of the Coastal Act liberally to accomplish the Act’s purposes and objectives. The Court held that the petitioner’s “strained characterization of the statute” was “unduly restrictive and violated both its clear language and the intent of the Legislature in enacting it.” The Court then concluded that the Commission’s determination that the development caused by the proposed well would occur within its geographic appeals jurisdiction was based on substantial evidence and found that the Commission did have appeals jurisdiction over the local government’s grant of the CDP.

The situation here is analogous. As in *Hair*, the development is not limited to the space solely occupied by the physical structure of the gate. There is substantial evidence that the foreseeable and intended development encompassed by the gate would extend to areas within the undisputed geographic appeals jurisdiction of the commission.

B. April 9, 2019 E-Mail

Mr. Rusin also sent staff an e-mail on April 9, 2019 arguing that Commission staff failed to comply with Malibu LIP Section 13.10.1, which requires the Executive Director of the Coastal Commission to, within two working days of the local government's request, transmit his or her determination as to whether the development is appealable. Mr. Rusin contends that the February 25, 2021 letter issued by Commission staff does not properly constitute the Executive Director's determination that the proposed project is appealable because it was signed by Denise Venegas, a Coastal Program Analyst for the South Central Coast District. Instead, Mr. Rusin believes that in order to comply with LIP Section 13.10.1, the letter would need to have been signed by Executive Director Jack Ainsworth (or, for some reason, copied him on the letter) and, as a result, the Executive Director has waived the opportunity to bring this matter before the Commission for resolution. As with Mr. Rusin's excessively formalistic arguments above, this argument fails as well.

Section 13032 of the Commission's regulations specifically authorizes the Executive Director to administer the affairs of the Commission. Section 13032 states:

> (a) In accordance with the direction and policies of the commission and pursuant to Public Resources Code Section 30335, the executive director shall administer the affairs of the commission and, subject to approval by that commission, the executive director of the commission shall on behalf of the commission and in accordance with applicable state and civil service procedures, appoint such other employees as may be necessary to carry out the functions of the commission.
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> (b) Except as specifically provided by resolution, the executive director may delegate the performance of any of his or her functions, but such delegation(s) shall not affect his or her responsibility to see that the directions and policies of the commission are carried out fully and faithfully.

Pursuant to Section 13032, the Executive Director in turn can delegate to Commission staff the performance of any of his or her functions. In the case of this dispute resolution, the Executive Director has delegated to Commission staff the authority to provide the City with a final jurisdictional determination. The Commission's regulations do not require further authorization from the Executive Director on this matter and Mr. Rusin's argument is incorrect.

For the convenience of the Commissioners, a timeline of correspondence related to this dispute resolution is provided here as well:

Dispute Resolution Correspondence Timeline

- **October 12, 2020** City of Malibu requests for Executive Director's Jurisdictional Determination regarding the appealability of CDP No. 20-018.

- **October 14, 2020** CCC sends response letter to City's October 12, 2020 request for an Executive Director's Jurisdictional Determination regarding CDP No. 20-018. CCC staff states that it has determined the proposed project is located within the appeals jurisdiction of the CCC based on the available information, however additional information regarding the top of bank of Escondido Canyon Creek is needed for a final jurisdictional determination.

- **December 23, 2020** City sends response letter to CCC October 14, 2020 Executive Director's Jurisdictional Determination letter providing details regarding the site survey's protocols used in the site survey.

- **December 28, 2020** CCC sends response letter to City's December 23, 2020 letter and restates that CCC staff has determined that the proposed project is located within the appeals jurisdiction of the CCC based on the available information, however additional information regarding the top of bank of Escondido Canyon Creek is still needed for a final jurisdictional determination.

- **February 23, 2021** City sends response letter to CCC December 28, 2020 letter stating that the proposed project has been modified, requesting a final Executive's Director's jurisdictional determination and for the matter to be scheduled for hearing if the Executive Director's determination in not in accordance with the Planning Director's determination.

- **February 25, 2021** CCC sends response Letter to City's February 23, 2021 response letter providing a final Executive Director's jurisdictional determination regarding CDP No. 20-018, concluding that the Executive Director does not agree with the City's Planning Director's determination, and therefore at the request of the City, the matter would be scheduled for the next available Commission meeting.

II. Correspondence Received from Nancy Goldstein; Staff's Response to Correspondence

On April 7, 2021, the Commission received a letter from Nancy Goldstein, the attorney representing the plaintiffs in the lawsuit between the applicants and MRCA. In her letter, Ms. Goldstein argues that the City of Malibu followed the applicable LCP provisions, found that the proposed project is not within the appeal jurisdiction of the Commission and that Commission staff erroneously relied on a provision not in the LCP to find the contrary.

Ms. Goldstein does not, however, identify this provision in her letter. Instead, she makes a lengthy recitation of the lawsuit between the applicants and MRCA to which the Commission is not a party, accuses the Commission of collusion with MRCA to sanction her clients, and characterizes the events that have led to this dispute resolution. Commission staff believes that Ms. Goldstein is referring to the same arguments made by Mr. Rusin on behalf of the City of Malibu. As such, the arguments presented above are sufficient to respond to Ms. Goldstein's letter as well.